Conflict Resolution and Systemic Change

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I. INTRODUCTION

Over the last fifty years, alternative dispute resolution (ADR) has become a fixture of the conflict resolution landscape.[1] As its label suggests, ADR is generally viewed as an alternative to adjudication, developed in response to litigation's liabilities—its expense, delay, adversarialism, and limits as a tool for addressing complex problems. In contrast, ADR's value rests in its capacity to produce prompt, fair, and efficient resolutions that satisfy the disputants.[2]

ADR proponents and critics alike presuppose that the benefits of ADR are achieved at inevitable costs. The assumption is that informal conflict resolution necessarily resolves disputes for the disputants and no one else.[3] It does so by satisfying the interests of those involved in the immediate conflict, often under guarantees of confidentiality. As a result, it is argued, ADR does not and cannot generate values or solutions that can apply beyond the scope of the particular dis-

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1. DAVID B. LIPSKY, RONALD L. SEEBER & RICHARD D. FINCHER, EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT 5 (2003); CARRIE MENKEL-MEADOW, LELA P. LOVE, ANDREA K. SCHNEIDER & JEAN R. STERNLIGHT, DISPUTE RESOLUTION: BEYOND THE ADJUDICATIVE MODEL (2005).

2. *See* WILLIAM URY, JEANNE BRETT & STEPHEN GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 43– 44 (1989); Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 277 (1982); Dockson, R.R, *Justice in the balance 2020: Report of the Commission on the Future of the California Courts. San Francisco: Supreme Court of California* 40– 41 (1993); Lauren B. Edelman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941, 950 (1999); Howard Gadlin, *The Ombudsman: What's in a Name?*, 16 NEGOT. J. 37, 42 (2000) [hereinafter Gadlin, *What's in a Name?*]; Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2664 n.9 (1995) [hereinafter Menkel-Meadow, *Whose Dispute*].

3. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984); Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to Reconstruction of the Juridical Subject*, 66 DEN. L. REV. 437, 491 (1989).

pute.[4] In this sense, it is assumed that informal conflict resolution is necessarily non-normative, and that it cannot yield more general public values or solutions to problems affecting more than the individual disputants.[5]

The confidentiality of ADR gives rise to a second perceived cost: lack of accountability. Confidentiality insulates the particulars of the dispute resolution process and outcome from public scrutiny.[6] If ADR cannot, consistent with the confidentiality requirement, include the opportunity for outside review, it is widely assumed that the process inevitability lacks any check on decision-maker bias.[7] Confidentiality is also seen to preclude holding ADR accountable in relation to any standards other than the efficiency of the process and the satisfaction of the disputants.[8]

These two assumptions about ADR—its inability to elaborate public values and its unaccountability—lie at the heart of the ADR critique. This critique typically contrasts the limitations of ADR with the countervailing virtues of adjudication as the paradigmatic form of norm elaboration and accountability.[9] Adjudication elaborates public norms by developing binding precedents in a particular case, which will then apply in the future to comparable cases. It achieves accountability by providing for public access and appellate review. ADR's critics and supporters presume that adjudication's method of elaborating public norms and providing accountability constitutes the preferred, if not the only way that these rule-of-law values can be achieved.[10]

This article suggests that the view of public norm elaboration and accountability underlying the critique of ADR is too narrow and needs to be rethought. Public norms do not consist only of the precedents developed and applied by courts or other adjudicative bodies. They also emerge when relevant institutional actors develop values or remedies through an accountable process of principled and participatory decision making, and then adapt these values and remedies to broader groups or situations. ADR can play a significant role in developing legitimate and effective solutions to common problems and, in the process, produce generalizable norms.

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4. *See* KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION (2000); Fiss, *supra* note 3, at 1085–86; Bryant G. Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12 STUD. L. POL. & SOC'Y 367, 383 (1992); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622–26 (1995).

5. *See* Kenneth Abraham, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355 (2002); Fiss, *supra* note 3, at 1085; Luban, *supra* note 4, at 2639–40.

6. American Bar Association, Standards for the Establishment and Operation of Ombuds Offices 7 (2004), *available at* http://www.abanet.org/adminlaw/ombuds/115.pdf [hereinafter ABA Standards] (establishing confidentiality as an essential characteristic of an ombuds office).

7. *See* JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 136 (1983); *see generally* Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (discussing the possibility that ADR may incorporate racial and ethnic bias); Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (arguing that gendered power dynamics may permeate the mediation process) (1991).

8. AUERBACH, *supra* note 7, at 136; Abraham, *supra* note 5, at 366–67; Luban, *supra* note 4, at 2648–49.

9. *See* Fiss, *supra* note 3, at 1085; Luban, *supra* note 4, at 2635 n.71.

10. *But see* Menkel-Meadow, *Whose Dispute, supra* note 2, at 2674, 2692–93 (discussing the potential for settlements to promote justice and elaborate norms).

We argue that, contrary to conventional wisdom and practice, ADR's capacity to generate accountable public norms stems from the linkage of individual and systemic conflict resolution.[11] Conflict resolution systems often segregate individual casework from systemic interventions aimed at addressing policy issues, examining recurring problems, or redesigning organizational systems. We demonstrate the value of integrating (but not merging) systemic thinking into individual casework, and individual cases into the project of understanding and addressing systemic concerns. The linchpin of our approach is a form of root cause analysis, which enables intermediaries to identify and, where possible, address underlying problems as part of individual case work. We document this novel form of conflict resolution that begins by attending to individual cases, but proceeds through a critical methodology to produce systemic interventions advancing public values. We demonstrate that, under certain circumstances, informal conflict resolution can produce systemic changes that adjudication cannot achieve, and can thus solve public problems and generate public values. Indeed, we argue that, in some situations, effective individual conflict resolution depends upon its linkage to systemic problem solving.

The methodologies used to link individual and systemic conflict resolution also provide a kind of accountability presumed to be unavailable without appellate review. We question the conventional assumption that "detached neutrality" is the only, or even the best, way to achieve impartiality and reduce the expression of bias. We introduce the idea of "multi-partiality"—critically analyzing a conflict from multiple vantage points—as a way to check the inevitable biases in decision making that must be continually surfaced and corrected.[12] Multi-partiality can be achieved through institutional design that builds in participatory accountability—ongoing examination and justification to participants and a community of practitioners. This reflective practice, if institutionalized, provides a check on conflict resolvers' biases by requiring conflict resolvers to subject their analysis to the scrutiny of their peers and to explain and justify their choices as part of doing their work. It also provides a way to learn from and build on experience.

These ideas developed through a process of reflective inquiry very much like the conflict resolution processes we propose. Susan Sturm's earlier article on second generation employment discrimination documents examples of conflict resolution systems that track data about complaint patterns over time and create intermediary roles enabling organizations to use this information for systemic problem solving.[13] As a result of this research, Susan Sturm was invited to work

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11. *See infra* Section III. Our emphasis on linkage of adjudication and informal conflict resolution, rather than their integration into a unitary system, distinguishes our approach from that taken in a series of articles by Richard Reuben. *See, e.g.,* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 956 (2000) (arguing for a unified system of public justice "in which trial, arbitration, mediation, evaluative techniques, and other forms of ADR all operate toward the single end of binding public civil dispute resolution.").

12. *See* Mary Wilkinson, *How Do We Understand Empathy Systematically?*, 14 J. FAM. THERAPY 193, 199 (1992) (citing Harlene Anderson & Harold A. Goolishian, *Human Systems as Linguistic Systems: Preliminary and Evolving Ideas about the Implications for Clinical Theory*, 27 FAM. PROCESS 371, 372–85 (1988)).

13. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. LAW. REV. 458, 499–500 (2001) [hereinafter Sturm, *Second Generation*].

with the Center for Cooperative Resolution/Office of the Ombudsman (CCR) at the National Institutes of Health (NIH) by Director and Ombudsman Howard Gadlin. [14] CCR is a comprehensive conflict resolution program located within NIH, a federal agency within the Department of Health and Human Services. From its inception, the office has explored the degree to which it could address systemic issues and still remain true to the ombuds' responsibility to address discrete conflicts. CCR defined its work in a way that challenged the dichotomies currently framing the conflict resolution debate.

We decided to work together in an effort to deepen understanding of the relationship of conflict resolution to systemic change. Susan structured a process of participatory inquiry to examine the working theories and strategies used to link individual conflict resolution and systemic problem solving. We began by collectively establishing a set of goals for our work, which included developing a vocabulary to analyze the relationship between individual and systemic problems, as well as improving our understanding of how and under what circumstances conflict resolution could produce systemic change. We were interested in providing conceptual frameworks and strategies for moving from the individual to the systemic and back.

We then held a series of meetings during which Susan asked the ombudsmen to identify current issues or cases they saw as structural or systemic, and then to work through how they learned about those problems, what type of information they used to develop their understanding of the problem over time, what led them to view those problems as structural or systemic, what they did to address those problems, and how they assessed their intervention. She also asked them to contrast those cases with those they identified as non-structural. We collaboratively developed a structural intervention log, which was used to varying degrees by the staff to track the cases that they identified as structural or systemic. Susan and her students also had a series of conversations with individual ombudsmen about their work. Over a period of about a year, we observed and debriefed forty case review sessions.[15] In addition, Susan participated in three retreats, two of which also included Ken Kressel, a conflict resolution scholar who was doing reflective practice work with CCR. Through this intensive back-and-forth between intervention theories and practical consequences, our inquiry coalesced into a framework for using conflict resolution to fairly and effectively address individual problems, and simultaneously to develop knowledge about and occasions to intervene at a more systemic level.[16]

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14. As part of their monthly Journal Club meeting, at which the staff discusses articles relevant to their work, CCR read Susan's article on Second Generation Employment Discrimination, which introduced the idea of conflict resolution as a means of systemic problem solving. *Id* at 499–509. Howard then came to Susan's class at Columbia Law School on the Theory and Practice of Workplace Equity, and there Howard faced a series of questions about the ways he was or was not addressing structural issues in his role. This prompted Howard to bring these questions back to the staff, and they invited Susan to help them think through the structural dimensions of their work.

15. Over the course of this project, Orna Rabinowich-Einy, Alexandra Marchosky, and Jennifer Kronick, who were students in Susan's Workplace Equity Seminar, performed important roles as co-researchers. They conducted interviews, attended group sessions and retreats, observed case reviews, and wrote up their observations.

16. Several constraints have operated during this research, many of which mirror some of the constraints under which the conflict resolution itself takes place. CCR operates under confidentiality requirements. As a result, the research was limited to observations and discussions with the CCR staff,

This article presents the fruits of that collaboration. It mines those lessons in aggregating knowledge from individual cases and prompting structural change, and considers the implications of this analysis for the design of informal conflict resolution systems. It provides a concrete setting to test the possibilities for intervention that advance public values and still preserve the capacity to afford individual justice. This inquiry also yielded new understandings of the meaning of impartiality, accountability, and public values.

The article proceeds in five parts. Section I defines the meaning of individual and systemic conflict, and then documents and critiques the conventional practice of separating them. Section II develops a matrix to map the dynamic relationship between individual and systemic analysis and intervention, and then applies that framework to particular examples. Drawing on case analyses, this section illustrates the interdependence of individual and systemic work, the methodologies used to link them, and the resulting synergies.

In Section III, the article considers the implications of this framework for conflict resolution and theories of law. We extrapolate from CCR's work in order to identify the elements of a conflict resolution program that can perform the role of integrating conflict resolution and systemic change. Through examples, we show that conflict resolution programs with these features may be found within the court system and administrative agencies, as well as in new institutions operating within organizations or service delivery systems. This section also discusses potential role conflicts created by the linkage and how they can be minimized. Finally, in Section IV, the matrix analysis is used to generate new theoretical understandings about conflict resolution and its relationship to rule-of-law values. We suggest that the CCR case study does more than raise questions about the assumptions underlying the traditional debate about conflict resolution. It offers a reconceptualization, or at least an expanded understanding, of core rule-of-law values, such as impartiality, principled decision making, generalizability, and accountability. Non-adjudicative conflict resolution can, under certain circumstances and institutional arrangements, embody rule-of-law principles and generate institutional practices advancing public values and addressing issues of common concern. We use this analysis to reconsider the relationship between adjudicative and non-adjudicative forms of conflict resolution.

II. THE CONVENTIONAL APPROACH: SEPARATING INDIVIDUAL AND SYSTEMIC CONFLICT RESOLUTION

Dispute resolution scholarship and practice frequently assign different approaches, and even different conflict resolution systems, to individual and systemic problems. This section first defines individual as compared to systemic

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conducted in a format that preserved the confidentiality of disputants or that were not bound by confidentiality. Researchers were not able to survey, observe, or interview anyone outside CCR about their involvement in particular cases handled by the office. CCR does not retain records revealing the identity or progress of particular cases once a dispute is resolved. The analysis in this article is based on meetings, discussions, and group work with CCR. No information that would reveal the identity of particular disputants or NIH employees was disclosed and none could be used in reporting this research.

conflict resolution. It then documents the tendency to separate these two forms in conflict resolution practice and scholarship, and offers reasons to question the desirability of this separation.

A. *Defining Individual and Systemic Conflict*

Much conflict resolution work originates as issues or problems between specific people. Often, parties will describe an issue as a dispute between individuals, and that designation determines the scope of the analysis and intervention for many forms of conflict resolution. However, many problems presented initially as personal or individual issues turn out to be rooted in policies, organizational practices, or systems affecting broader groups.[17]

Of course, in some sense, every conflict or problem is systemic. Every individual operates in the context of a system—a psychodynamic system, a family system, a work group, etc. As used here, however, "systemic" defines how problems are understood for purposes of intervention at the appropriate level. This goal justifies a more targeted distinction between individual and systemic cases, one that limits the definition of "systemic" to problems that are amenable to analysis and intervention within the context of the organization or the domains over which the organization has influence, where the source can be located, at least in part, in organizational rules, practices, decisions, or norms.

When considered in relation to the project of intervention, "individual" cases can be defined as conflicts between direct disputants involving personal issues that do not involve others or implicate public values. They are essentially self-contained problems particular to the parties in a conflict or dispute. People other than those directly involved do not affect and are not affected by the conflict or its resolution. Individual conflicts can be addressed on their own terms without considering more general concerns or the implications of those cases for public values.

Individual disputes are contrasted with conflicts involving conditions, practices, or values that matter to people beyond those directly involved in a dispute. These kinds of conflicts are systemic, in the sense that they cannot be fully understood or addressed within the parameters of the conflict among the primary parties. The underlying source is located outside the problem as it is presented by the parties. Systemic problems often involve actors who are not involved in the immediate conflict as initially framed. The problems they reveal could be connected to a broader set of goals that affect how the problem can be addressed. They frequently involve issues or values of more general concern. These are often recurring problems because routines or practices create the conditions making the dysfunction more likely.

Some scholars label systemic problems as "structural," based on the observation that many conflicts are rooted in conditions sustained by institutional prac-

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17. *See* JAMSHID GHARAJADEGHI, SYSTEMS THINKING, SECOND EDITION: MANAGING CHAOS AND COMPLEXITY: A PLATFORM FOR DESIGNING BUSINESS ARCHITECTURE (2005); Wendell Jones, *Complex Adaptive Systems, Beyond Intractability* (Guy Burgess & Heidi Burgess eds., 2003), *available at* http://www.beyondintractability.org/essay/complex_adaptive_systems/; John Paul MacDuffie, *The Road to "Root Cause": Shop-Floor Problem-Solving at Three Auto Assembly Plants*, 43 MGMT. SCI. 479, 494 (1997).

JOURNAL OF DISPUTE RESOLUTION   [Vol. 2007

tices. However, this term seemed less fitting here because some problems of general concern may not be actually rooted in structure. This article also does not use the label "public" to refer to disputes implicating problems and values of general concern because this term carries different meanings for different constituencies. Lawyers tend to equate "public" with government involvement,[18] but conflicts may implicate more general values and conditions without necessarily involving judicial or legislative requirements. Indeed, part of this project involves providing greater understanding of the relationship between informal conflict resolution and the generation of public norms.

B. The Tendency to Separate Individual and Systemic Problems

Many conflict resolution systems rely on disputants to determine the scope of the conflict and the resulting intervention. These systems pose a choice up front between addressing a problem as a discrete, individual dispute involving only the participants, or as a systemic issue. Analysis and intervention occur on either the individual or the systemic level, rather than on the interaction between the two.

Mediation, which is the most common form of ADR, often exemplifies this tendency.[19] Mediation programs are designed to provide a voluntary and participatory process for addressing disputes.[20] They involve a third party who assists disputants in finding a solution of their own.[21] Typically, mediation's methodologies, roles, and relationships are geared toward reaching successful outcomes in individual cases.[22] The inquiry proceeds from disputants' understanding of the problem and seeks a resolution based on the parties' interests. Success is often evaluated in terms of prompt resolution, party satisfaction, improvement of the disputants' relationship over time, and cost-effectiveness.[23] Each case is resolved on its own terms, detached from the organizational or systemic dynamics implicated by its occurrence. The preference, in fact, is to use outside mediators who have no ongoing relationship with the organization or knowledge of the particular context, thus providing a "neutral" perspective.[24]

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18. *See, e.g,.* Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1297 (1976); Fiss, *supra* note 3, at 1089.

19. LIPSKY, SEEBER & FINCHER, *supra* note 1, at 81–82 (reporting that mediation is the most frequently used and preferred form of conflict resolution).

20. Lon L. Fuller, *Mediation-Its Forms and* Functions, 44 S. CAL. L. REV. 305, 325 (1971); MENKEL-MEADOW, LOVE, SCHNEIDER & STERNLIGHT, *supra* note 1, at 266.

21. "Mediation offers the possibility of party-crafted solutions to problems, disputes, conflicts, transaction and relationships, which are facilitated by a third party with no authority to decide anything or to impose rules." MENKEL-MEADOW, LOVE, SCHNEIDER & STERNLIGHT, *supra* note 1, at 7.

22. There are important differences and disagreements among mediators about mediations' goals, the role of the mediator, and the criteria for success. Mediation could be "facilitative," "evaluative," or "transformative." *See generally* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping our Legal System,* 108 PENN ST. L. REV. 165 (2003) (summarizing differences in these mediation strategies). These strategies share a focus on individual dispute settlement.

23. LIPSKY, SEEBER & FINCHER, *supra* note 1, at 284–95 (discussing evaluation of conflict management systems through case examples); Dean G. Pruitt, Robert S. Peirce, Neil B. McGillicuddy, Gary L. Welton & Lynn M. Castrianno, *Long-Term Success in Mediation,* 17 LAW & HUM. BEHAV. 313, 314 (1993).

24. *See* LIPSKY, SEEBER & FINCHER, *supra* note 1, at 186.

In general, mediation programs are not designed to connect resolving individual cases with identifying and addressing systemic concerns or problems. Unless systemic issues are the focus of the dispute as framed by the parties to a mediation, they remain off the table and are taken as constraints within which the mediation proceeds. For example, the Equal Employment Opportunity Commission (EEOC) has been found to address disputes on a case-by-case basis and "individualize complaints."[25] EEOC mediation is not consistently successful, often exacerbating workplace tensions.[26] Federal government officials involved in mediating disputes frequently equate settling a dispute with resolving conflict to the satisfaction of the parties, representatives, and EEOC officials involved in the complaints. They "believe that resolving individual cases adds up to solving systemic problems."[27] If systems analysis does occur, it focuses on the performance of the conflict resolution system itself—its efficiency, level of party satisfaction, and cost.[28] This focus does not equip conflict resolvers to use knowledge gained from engaging with recurring problems or institutional patterns.[29] Mediations targeting collective problems or group interests are often defined as such from the outset of the process, and explicitly avoid addressing individual issues.[30]

Ombuds offices are a form of dispute resolution with responsibility for both individual and systemic issues. They work "for the resolution of particular issues, and where necessary, make recommendations for the improvement of the general administration of the entity."[31] Ombuds offices have become common place in universities, corporations, and federal, state, and local government.[32] Several

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25. *ADR Brief: ABA Meeting Examines Why Companies Don't Mediate at the EEOC*, 22 ALTERNATIVES TO HIGH COST LITIG. 83, 86 (2004) [hereinafter *ADR Brief*].

26. One study shows that 50% of companies avoid EEOC mediation because they believe it requires monetary compensation. *Id.* at 84.

27. *Id.* at 85.

28. *See* LIPSKY, SEEBER & FINCHER, *supra* note 1, at 265–66. For example, Bingham and Pitts have conducted an ongoing longitudinal evaluation of United States Postal Service's REDRESS program, the largest employment dispute resolution program. *See* Lisa B. Bingham & David W. Pitts, *Highlights of Mediation at Work: Studies of the National REDRESS Evaluation Project*, 18 NEGOT. J. 135 (2002). REDRESS provides facilitative mediation for equal opportunity disputes arising out of federal discrimination claims. REDRESS is a case-by-case model that focuses on the individual. Although Indiana University has been evaluating the program since inception, the researchers' data-tracking focuses on individual concerns and perceptions, not necessarily systemic issues. *Id.* at 136.

29. *See generally* Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 HAMLINE L. REV. 261 (arguing that current ADR approaches are ineffective and fail to address disputes early enough, understand how conflicts arise, and explore a change in methods to deal with conflict).

30. *See generally* LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES (1987).

31. ABA Standards, *supra* note 6, at 1.

32. *See* Jeffrey S. Lubbers, *Ombudsman Offices in the Federal Government—An Emerging Trend?*, 22 ADMIN. & REG. L. NEWS (1997), *available at* http://www.abanet.org/adminlaw/news/vol22no4/ombudsmn.html; D. Leah Meltzer, *The Federal Workplace Ombuds*, 13 OHIO ST. J. ON DISP. RESOL. 549, 552–53 (1998), *available at* http://www.abanet.org/adminlaw/ombuds/fwtoc.html; Michael Mills, Municipal Government Ombudsman (1994), http://www.usombudsman.org/en/references/more_references/municipal_government_ombudsman.cfm; Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, 1 NEGOT. J. 127, 127 (1987) [hereinafter Rowe, *Corporate Ombudsman*].

ombuds organizations have emerged to provide information sharing and some measure of coordination among the various ombuds offices.[33]

Ombuds offices typically combine individual conflict resolution with some responsibility for identifying complaint patterns and trends and providing "upward feedback" to the organizational leadership about systemic problems.[34] Although there are differences in type and philosophy,[35] "all ombudsmen give voice to people who might otherwise be disadvantaged in their dealings with the management and bureaucracy of the institution within which the ombudsman functions."[36] "Ombudsman Association surveys indicate that about a third of the working time of organizational ombudspeople is spent on systems change—that is working with line and staff managers to improve supervision, human services and conflict management system of the organization."[37]

Ombuds offices struggle with the question of how to integrate systemic intervention into their regular practice. Systems-level work consists primarily of periodic reports to the public or to upper management based on an analysis of patterns from the aggregate data.[38] Many offices are set up to separate individual from systemic work.[39] Some offices do emphasize the ombuds' ability to serve as an early warning system—"to receive, perhaps analyze, then pass along information that will foster timely change in a company policy."[40] This role is referred to as "upward feedback."[41] The ombuds offices thus function as information conduits to flag problems. They do not routinely use systemic analysis as part of their individual casework, which is the primary focus of their practice. Participation in organizational change initiatives is often described as a process entirely separate from case work, usually initiated by management in response to an identified problem or crisis.[42]

On the surface, Integrated Conflict Management Systems (ICMS) look like programs designed to connect individual and systemic problem solving. The goal of ICMS is "to apply the techniques and sensibility of interest-based negotiation to

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33. Lubbers, *supra* note 32; Gadlin, *What's in a Name?, supra* note 2, at 41 (describing the creation of the Ombudsman Association, the United States Ombudsman Association, and University and College Ombudsman Association).

34. *See* Rowe, *Corporate Ombudsman, supra* note 32, at 131; *see also* Marsha Wagner, *The Organizational Ombudsman as Change Agent*, 16 NEGOT. J. 99, 107–08 (2000).

35. Gadlin identifies two types of ombudsmen: classical and organizational, with variations in each category. Classical ombudsmen emphasize "statutory independence from governmental control, the power to investigate complaints, and the authority to publish findings and recommendations." Organizational ombudsmen generally approach issues within an organization beyond a right/wrong judgment, but rather as an alternative to adjudicatory approaches. Gadlin, *What's in a Name?, supra* note 2, at 38, 43.

36. Gadlin, *What's in a Name?, supra* note 2, at 37–48.

37. Mary P. Rowe & Dean M. Gottenhrer, *Similarities and Differences Between Public and Private Sector Ombudsmen,* (working paper prepared for the 1997 Spring Meeting of the American Bar Association, Section of Administrative Law and Regulatory Practice, Hotel Washington, Washington, D.C., Apr. 18, 1997), *available at* http://www.abanet.org/adminlaw/ombuds/g&rsimilar.html.

38. Wagner, *supra* note 34; Rowe, *Corporate Ombudsman, supra* note 32, at 131-32.

39. Rowe, *Corporate Ombudsman, supra* note 32, at 132; ABA Standards, *supra* note 6, at 6-7.

40. Rowe, *Corporate Ombudsman, supra* note 32, at 131.

41. *Id.; see also* Meltzer, *supra* note 32, at IV.A.2.

42. *See generally, e.g.,* Helen Hasenfeld, *The Ombudsperson as a Change Agent* (1995) (describing three examples of institutional change instigated by the ombudsperson at California Institute of Technology) (on file with author).

the identification, prevention, management, and resolution of conflict within organizations."[43] ICMS uses "a coordinated set of easily accessible organizational mechanisms to identify conflict in its earliest stages, manage it carefully to prevent escalation, and to resolve it efficiently in order to maintain positive workplace relations."[44]

Despite its emphasis on integration, the logic of ICMS in fact segregates the process of conflict resolution. The system provides comprehensive services, but by different offices that are largely separate in their operation. Individual conflicts could be resolved by a hotline, a mediation office, peer mediation, a grievance procedure, or an ombudsman resolving individual conflicts.[45] Systemic problems would be the responsibility of management. Crucially, all of these separate processes are then integrated into a unitary system overseen by management and committed to the goals of conflict prevention and improved productivity.[46] ICMS are often management driven, and precipitated by concerns about litigation reduction.[47]

Like informal conflict resolution, adjudication also involves contexts with repeat players and recurring problems, especially when the adjudication is performed by administrative agencies with responsibility for a particular domain.[48] Yet, administrative agencies also tend to separate their dispute resolution activities from their preventive and standard-setting work.[49] They too proceed on the assumption that cases are either private or public, individual or systemic, conflict resolving or norm generating.[50] Administrative case processing tends to be sepa-

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43. Howard Gadlin, Bargaining in the Shadow of Management: Integrated Conflict Management Systems 1 (Oct. 10, 2004) (unpublished manuscript, on file with author).

44. *Id.*

45. *See* LIPSKY, SEEBER & FINCHER, *supra* note 1, at 168-82 (describing these organs as design features of an internal management systems).

46. Mary Rowe, *Dispute Resolution in the Nonunion Environment: An Evolution Toward Integrated Systems for Conflict Management, in* WORKPLACE DISPUTE RESOLUTION 96-97 (Sandra Geason ed., 1997)   [hereinafter   Rowe,   Integrated   Systems],   *available   at* http://web.mit.edu/ombud/publications/reso.pdf (describing a typical integrated conflict management system, which is administered by human resources and senior management).

47. *See* Jennifer F. Lynch, *Beyond ADR: A Systems Approach to Conflict Management*, Columns, 17 NEGOT. J. 208, 212 (2001); Gadlin, *supra* note 43, at 8 (explaining that "the conceptual framework of dispute systems design is formed almost exclusively around the concerns of managers: cutting costs, enhancing productivity, and containing conflict"). *See also* LIPSKY, SEEBER & FINCHER, *supra* note 1, at 6-8 (discussing corporate dissatisfaction with litigation as a form of dispute resolution, leading businesses to consider alternative procedures).

48. *See* MALCOLM K. SPARROW, IMPOSING DUTIES: GOVERNMENT'S CHANGING APPROACH TO COMPLIANCE 108-09 (1994).

49. Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 HAMLINE L. REV. 261, 264 (finding that ADR is typically "used in tandem with traditional legal remedies. Mediation is largely being chosen *after* filing of EEOC complaints, *after* commencement of lawsuits, and as part of court-annexed ADR programs").

50. *See* Kenneth Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L. J. 377, 434 (2006); Lisa B. Bingham & Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate Its Success?*, 6 J. PUB. ADMIN.   RES.   &   THEORY   383,   397   (1996),   *available   at* http://www.jstor.org/view/10531858/ap040023/04a00030/0 (evaluating the implementation of the Act in federal agency through empirical research and finding that ADR was used most in EEO disputes, personnel, and procurement, but did not extend broadly to the general public in regulatory and program matters). *See also generally* Lawrence E. Susskind & Joshua Secunda, *The Risks and Advantages of*

rated from problem identification and system reform.[51] Federal agencies' dispute resolution programs typically address disputes on an individual, case-by-case basis.[52] The Equal Employment Opportunity Commission, for example, segregates its case processing functions from its "technical assistance," policy making, prevention, and training functions. Internal Equal Employment Opportunity (EEO) offices that handle formal discrimination claims within bureaucracies are often set up much the same way: they process individual discrimination cases, but do not track patterns or reveal recurring patterns.[53] Individual cases are analyzed only in terms of their impact on the formal parties.[54]

Conflict resolution scholarship has to some degree reinforced this separation of individual and systemic intervention. The classic articles celebrating the judiciary's special role in elaborating public norms draw a stark line between private dispute resolution and public law.[55] Typologies of conflict resolution typically place individual and systemic processes on different ends of a progression or on different levels of a dispute resolution pyramid. Some analyses presume that systemic issues should be reached only if individual dispute resolution fails.[56] Others suggest that systemic problem solving will only work if individual conflict resolution takes a back seat.[57] There has been relatively little work on the methodology of systemic conflict resolution, and even less on the relationship between individual and systemic interventions. The field lacks research on how a practice structured around resolving cases can effectively integrate individual conflict resolution and systemic change without compromising the integrity of either. Conflict resolution programs that try to connect these two levels often proceed intuitively, without adequate language or theories to guide their practice.

Agency Discretion: Evidence from EPA's Project XL, 17 UCLA J. ENVTL. L. & POL'Y 67 (1999) (describing the intellectual, legal and cultural obstacles that have impeded Environmental Protection Agency efforts to adopt a flexible approach to regulation).

51. Bill Simon made a similar observation about the separation of adjudication and administrative functions in the context of public assistance. *See* William H. Simon, *Legality, Bureaucracy and Class in the Welfare System,* 92 YALE L.J. 1198, 1246 (1983).

52. *ADR Vision Roundtable: Challenges for the 21st Century,* DISP. RESOL. J., Aug.-Sept. 2001, at 8, 16 (documenting this individual casework approach in federal agencies).

53. *See, e.g.,* U.S. Equal Employment Opportunity Commission, Priority Charge Handling Task Force Litigation Task Force Report (1998), *available at* http://www.eeoc.gov/abouteeoc/task_reports/pchlit-1.html (reflecting the EEOC's segregation of individual from systemic work and of mediation from problem identification).

54. Some administrative agencies have adopted an approach that resembles CCR's in their effort to link individual case work and systemic redesign, particularly in the areas of criminal justice, health care and child welfare. These programs are discussed *infra* in Sections III & IV.

55. Chayes, *supra* note 18, at 1284; Fiss, *supra* note 3, at 1085. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds,* 117 HARV. L. REV. 1015, 1057 (2004) (claiming that Chayes's analysis ignores "the systemic and self-consciously regulatory aspects" of individual dispute resolution).

56. *See, e.g.,* Lynch, *supra,* note 47, at 212 (describing systems designed so that conflict is resolved "at the earliest time and the lowest level possible"); Meltzer, *supra* note 32 at 572.

57. *See* William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rules Regimes, in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 37, 53 (Grainne de Burca & Joanne Scott eds., 2006) [hereinafter Simon, *Toyota Jurisprudence*]; SUSSKIND & CRUIKSHANK, *supra* note 30, at 70-76.

C. *Rethinking the Conventional Wisdom*

This analysis suggests that the conventional separation of individual and systemic problem solving should be rethought. Well-structured linkage of individual conflict resolution and systemic change enhances the efficacy and legitimacy of both. Indeed, in important respects, individual conflict resolution and systemic change are interdependent. This section shows why linkage of individual and systemic conflict resolution is a good idea. The next section illustrates these arguments with examples from CCR's practice.

One compelling reason to link individual and systemic conflict resolution is increased efficacy. For individual cases, identification of underlying, systemic causes often de-personalizes a conflict and makes it possible to engage disputants in problem solving. Moreover, conflict resolvers and disputants do not know at the outset of a conflict whether an issue is rooted in systemic problems, and whether those problems are amenable to a systemic intervention. Many cases do not fall neatly into one or the other category. As Carrie Menkel-Meadow commented after mediating a series of auto accident cases:

> I am struck by the difficulty of characterizing disputes. On one hand, all of these cases were "simple" car accidents: factual disputes about small amounts of money, with issues ranging from full liability disputes to disagreements about the value of medical expenses and property damage. . . . On the other hand, however, any single one of these cases could also be taken as representative of any number of very important public or democratic issues. Insurance companies were clamping down on alleged widespread fraud by plaintiffs, their doctors, and their lawyers in overclaiming. Virtually all of these disputes involved the multicultural/racial issues that are sub rosa in increasingly diverse Los Angeles. Lawyers made arguments about how the racial composition of juries would affect the valuation of cases. And standards of human behavior and responsibility were constantly being negotiated in these sessions, both with reference to the law "on the books" and in reality.[58]

Often, the capacity to understand and address cases effectively at the level of the individual requires a systemic understanding that develops from the opportunity to step back and address problems outside the context of a particular conflict. Many individual problems cannot be remedied effectively without addressing their systemic underpinnings. If individual problems are rooted in a system that remains unchanged, the problem is likely to resist remediation or to recur. In any case, searching for systemic problems enhances legitimacy even when the search results in a determination that the system worked well, and that an individual intervention was appropriate.

Ongoing involvement with individual conflicts also enhances the capacity to address systemic issues, if the program is set up to link these two levels. Engagement with cases over time equips conflict intermediaries to identify, understand, and address systemic problems. Case work enables problem identification

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58. Menkel-Meadow, *Whose Dispute?*, *supra* note 2, at n.24 (internal citations omitted).

to emerge out of ongoing pattern analysis, so that unrecognized problems can eventually be detected. Many problems combine interpersonal aspects with structural aspects. Both must be addressed for change to occur. Ongoing casework may be necessary to create sufficient pressure or support for change, and to engage stakeholders whose participation in the problem-solving process is required to develop workable and legitimate remedies. The legitimacy of structural change often hinges upon also being able to remedy unfairness at the level of the individual. Unresolved individual problems breed dissatisfaction with reform, and can foster resistance or backlash.

Thus, individual casework provides situated knowledge, legitimacy, and participation needed to sustain systemic change. This analysis provides a counterargument to proposals for separating systemic change and individual conflict resolution. In *Toyota Jurisprudence,* for example, Bill Simon advocates bracketing and muting individual concerns, and focusing "jurisprudence" solely on systemic problem solving. He expresses concern that attention to individual fairness concerns necessarily disrupts a collective problem-solving process. Simon draws on the example of Toyota's problem-solving system within its production process, in which every individual can pull an "andon cord," which then stops production and forces everyone affected by or responsible for the breakdown to figure out how to prevent the problem from recurring. Simon advocates applying this metaphor to the context of public problem solving.[59] But his article does not address how to transfer this methodology from a business to a public arena.[60] Systems change requires that information about systemic problems come from stakeholders operating at the points of breakdown, where changes in practice are most needed. Reliance on pre-constituted deliberative bodies or outside audits does not necessarily fulfill this function. These methods tend to function outside the working unit; they do not necessarily involve those operating at crucial leverage points. They also do not necessarily provide a mechanism to propel change. What's more, people may not recognize that the problems they experience have deeper roots, or that they can be remedied. Many problems go undetected or remain unchanged because there is no impetus to address them. Systems problems can be particularly challenging to address in the context of crises, when relationships are highly charged and more adversarial.

Conflict resolution can operate as this much-needed trigger for systemic analysis and change. Conflicts are focused and discrete, and yet are connected to systems and underlying causes. Issues raised through conflict resolution offer a mechanism prompting analysis and intervention, particularly when the costs of raising questions are low. In many areas, the interactions around issues of individual fairness are the equivalent of the andon cord on the Toyota shop floor. They are the trigger that brings recurring problems to the attention of the group. The linkage of individual and systemic problems allows breakdowns in practice to become part of the data contributing to the understanding of a systemic problem.

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59. Simon, *Toyota Jurispridence, supra* note 57, at 45.

60. *See* JIM COLLINS, GOOD TO GREAT AND THE SOCIAL SECTORS 1 (2005) (rejecting the "well-intentioned, but dead wrong" idea that social sectors can be strengthened by wholesale importation of common business practices).

They also allow a problem to be "chunked"—to be defined at the appropriate level of scope and depth so that it has the prospect of a successful intervention.[61]

Although, conflict resolution practitioners have begun to recognize the importance of linking individual conflict resolutions with systemic change,[62] they lack knowledge about how to connect these levels, both in their casework and in the design of the conflict resolution system. Questions persist about how this integration can be achieved without compromising basic principles such as confidentiality and commitment to participant agreement as the basis for intervention. Addressing these "how" questions is a crucial step toward conducting conflict resolution so that it can generate public norms and achieve accountability. The remainder of this article undertakes that important work.

III. ANALYZING THE RELATIONSHIP BETWEEN INDIVIDUAL AND SYSTEMIC WORK

This section draws on CCR's practice to develop a framework for understanding the dynamic relationship between individual and systemic work analysis and intervention. It begins with a description of the office and its practice, and then fleshes out the meaning of systemic conflict by categorizing the kinds of systemic problems that may arise. Finally, the analysis works through examples to illustrate the different ways in which individual and systemic work interrelate in practice.

A. *An Overview of the Office of the Ombudsman/Center for Cooperative Resolution*

CCR is a comprehensive conflict resolution program offering assistance to employees in addressing conflicts and concerns involving scientific and workplace issues at the National Institutes of Health (NIH). NIH is "the federal focal point for medical research in the United States," and its mission is "to uncover new knowledge about the prevention, detection, diagnosis and treatment of disease and disability."[63] CCR was created in 1998, following a one-year pilot program. Its mission is to provide "conflict prevention and intervention, conflict

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61. Charles F. Sabel, *A Real Time Revolution in Routines*, in THE FIRM AS A COLLABORATIVE COMMUNITY 106 (Charles Heckscher & Paul Adler eds., 2006).

62. *See generally, e.g.*, John S. Barkat, Blueprint for Success: How to Effectively Design an Organizational Ombuds Department (2002), *available at* http://www.abanet.org/adminlaw/ombuds/blue-3-26-pm2.pdf (arguing that one of the three vital functions of an ombuds office is organizational critical self-analysis, using institutional knowledge gathered to improve organizational practices); Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2004); Mary P. Rowe, *The Ombudsman's Role in a Dispute Resolution System*, 7 NEGOT. J. 353, 360 (1991) (arguing that "ombuds practitioners can help to provide 'motivation, resources, and skills' for continuous problem solving in times of change, within a dispute resolution system").

63. NATIONAL INSTITUTES OF HEALTH, FINAL FY2003 GPRA ANNUAL PERFORMANCE PLAN (2003), *available at* http://www1.od.nih.gov/gpra/fy2003final.pdf. NIH is comprised of twenty-seven institutes and centers located on its Bethesda campus, plus relationships with universities, hospitals, research institutions, and pharmaceutical and biotechnology companies that conduct research directed and/or funded by NIH. About 10% of the NIH's budget supports projects conducted by nearly 6,000 scientists in its own laboratories, most of which are on the NIH campus in Bethesda, Maryland. NIH has an annual budget of approximately $28 billion. *Id.*

management including education, and case-specific follow up" for NIH scientists and administrative employees.[64] It operates as the hub of NIH's conflict process-ing system by providing: (1) dispute resolution through neutral, confidential, and informal processes; (2) conflict management and prevention through training and education; and (3) dispute systems design to create or improve mechanisms to effectively handle disputes.

CCR addresses "every sort of issue that arises in the NIH environment: scien-tific disputes, employer-supervisor conflicts, racial and ethnic tensions and diffi-culties between peers."[65] CCR staff handles individual, interpersonal conflicts, multi-party, group, and organizational concerns. They perform these functions through an array of techniques, including coaching, facilitation, consultation, shut-tle diplomacy, peer panels, training, presentations, and systems design. The office is specifically charged with responsibility for "receiving and inquiring into work-place disputes brought to the Ombudsman by any NIH staff member, initiating independent inquiries, identifying and analyzing systemic issues that foster work-place disputes, and making recommendations to the appropriate responsible agency official(s) for changes in policies and procedures."[66] The ombudsmen also participate *ex officio* on key committees addressing issues relevant to their work, such as the Ethics Committee and various policy committees. They offer a range of services not limited to individual conflict resolution. CCR is primed to think systematically about the relationship between individual and systemic issues and problems, and its role in mediating between the two levels.

Although CCR is located administratively in the office of the Director, it op-erates independently and is outside any of NIH's constituent institutes or centers. The Director is not authorized to dictate the methods, content, or focus of CCR's work. CCR is not accountable to or integrated with management systems. It is an independent office designed to help employees at all levels address conflicts and concerns about their work.[67]

CCR is not the only conflict resolution program operating at NIH. There is an Office of Equal Opportunity and Diversity that processes discrimination com-plaints,[68] a human resources office that has established procedures accompanying adverse employment actions,[69] a program to help handle situations in which there

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64. NIH OFFICE OF THE OMBUDSMAN, THE CENTER FOR COOPERATIVE RESOLUTION, ANNUAL REPORT 1 (1999), *available at* http://www4.od.nih.gov/ccr/ombudsman.pdf [hereinafter 1999 ANNUAL REPORT]. According to CCR's 2005 Business Plan, "[c]ases increasingly involve scientific matters (collaboration issues, scientific vision, and authorship) or entire organizationa (lab units, branches, offices). In 2003, 45% of the cases involved scientific matters and 50 of 518 cases – amost 10% -- were with groups of different sizes." *Id.* In addition, CCR works closely with the EEO community, and this collaboration produced a 17 % increase in the resolution of precomplaints. *Id.* at 4-5.

65. NIH OFFICE OF THE OMBUDSMAN, THE CENTER FOR COOPERATIVE RESOLUTION, FY 2005 BUSINESS PLAN, 2 (2004).

66. NIH OFFICE OF THE OMBUDSMAN/CENTER FOR COOPERATIVE RESOLUTION, FUNCTIONAL STATEMENT, http://www4.od.nih.gov/ccr/overview.html.

67. In this important respect, the logic behind CCR differs from Integrated Conflict Management Systems, which are designed to manage conflict to minimize costs and maximize productivity. *See infra* Sections III & IV.

68. An overview of the Office of Equal Opportunity and Diversity Management is available at http://oeo.od.nih.gov/.

69. The NIH procedures for taking adverse action based on performance are set forth at http://hr.od.nih.gov/ER/Perfissues.htm.

might be a threat of violence, and an employee assistance program providing counseling and referrals for personal, family, or job-related problems that could interfere with job performance or conduct.[70]

A key feature of CCR is its deliberate design as an interdisciplinary collaboration.[71] The staff includes: (1) Howard Gadlin, the Ombudsman, a former tenured professor of experimental psychology and university ombudsman;[72] (2) The Deputy Ombudsman, who has a masters degree in public administration and a certificate in organizational development;[73] and (3) three associate ombudsmen, including an associate ombudsman with a counseling and psychology background and a Ph.D. in counseling psychology, another with a law degree and a Ph.D. in English literature and poetry, and a junior ombudsman with experience in a biomedical research laboratory and a recent law degree. The office is also somewhat demographically diverse, by age, race, and gender.

The office has made a commitment to reflect regularly about the systemic dimensions of its work. This is in part built into its mission. Like many ombuds offices, CCR is charged with helping the agency address systemic issues that arise in the context of their conflict resolution work.[74] The office has undertaken to integrate systemic approaches into the fabric of its individual casework. This commitment grew out of its ongoing reflective practice work. The entire staff meets every Thursday to discuss their most interesting and challenging interventions. Case review is an ongoing form of critical evaluation, in an atmosphere where acknowledging uncertainty about one's actions is acceptable and identifying mistakes is seen as a step toward improving effectiveness.[75] CCR also has a "staff huddle" every Monday morning, so everyone will have an idea of what work is being done in the office. They periodically write reports for the whole organization, which summarize their activities and focus attention on recurring problems and systemic issues. They have worked intensively with a researcher using a reflective practice methodology inspired by Donald Schon's work to increase their understanding of conflict dynamics and effective interventions.[76] This model "enables them to talk easily about mistakes and successes in a safe way."[77]

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70. An overview of employee relations at NIH is available at http://hr.od.nih.gov/ER/Default.htm.

71. "Diversity of backgrounds was crucial to Howard in putting together the office. He wanted to put together an ensemble of different people who could still work together." Interview with CCR Ombuds, Office of the Ombudsman/Center for Cooperative Resolution, National Institutes of Health, Department of Health and Human Services, in Bethesda, Md. (Feb. 28, 2002) (on file with authors).

72. Gadlin served as ombudsman while he was on the faculty at University of Massachusetts, Amhurst, and then worked as an ombudsman at UCLA before coming to NIH to create the Office of the Ombudsman.

73. Doris was hired because Howard was looking for someone who could perform multiple tasks, not only to intervene but to do training and program development. Interview with CCR Ombuds, in Bethesda, Md. (Mar. 20, 2002) (on file with authors).

74. *See* Rowe, *supra* note 32, at 131; Meltzer, *supra* note 32, at 558; Wagner, *supra* note 34, at 107–08.

75. The process of critically evaluating cases that pose problems was inspired by the model of Morbidity and Mortality rounds in medicine. Interview with Howard Gadlin, in Bethesda, Md. (Feb. 28, 2002) (on file with authors). *See* Atul Gawande, *When Doctors Make Mistakes*, THE NEW YORKER, Feb. 1, 1999, at 48.

76. *See* DONALD A. SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION 61, 68-69 (1983) (describing the practice of "reflection-in-action"). That collaboration led to another jointly authored article by Kenneth Kressel and Howard Gadlin, entitled "Mediating Among

CCR employs a version of root cause analysis as its overarching methodology. The stance at the beginning of a case is one of inquiry: a careful, back-and-forth process of identifying the source of the problem. The ombuds officers have come to approach their cases through a process of discovery. They attempt to identify the central issues in a conflict by asking why a certain problem exists, and why that state of affairs in fact constitutes a problem. They then try to engage the appropriate actors in addressing the conflict or problem, either in the context of the particular dispute or at a more institutional level. One of the strengths that Howard Gadlin brought to the office was the skill of reframing issues in new terms, which engages both interveners and parties in understanding the conflict on multiple levels. Through critical reframing and root cause analysis, CCR's methodology moves back and forth between the individual/personal and the systemic/organizational.[78]

The starting point for most CCR interventions is a consultation initiated by an NIH employee or group of employees. Most people come to the CCR office because they question the fairness of an impending or actual decision or action. Typically, the ombudsman will review with the inquiring person the possible options for responding to the action as well as the possible consequences of pursuing those options. In some instances people do not want direct intervention from the ombudsman. They just seek some guidance on how to handle the situation in a less adversarial manner than they might use if left to their own devices. In other instances they want the ombudsman to become directly involved.

In every case, the ombudsman's first obligation is to understand the history and basic dynamics of the situation about which the person is consulting, the key issues for the person seeking the consultation, and that person's reasons and hopes for seeking help. The ombudsman must craft interventions that are consonant with the needs and interests of the consulting party. The ombudsman will explain the rationale for possible approaches to intervention, but will not proceed without the person's assent.

If the person who first consulted the ombudsman gives permission, then the ombudsman may also discuss the matter with the person whose action or decision has triggered the inquirer's concerns. This is almost always the next step in situations where the person who made the initial contact asks the ombudsman to facilitate a discussion with the other party or even to conduct an actual mediation. In those situations the ombudsman will first meet separately with the second party, in an attempt to understand the situation from that person's perspective and explain the ombudsman's obligations and commitment to fairness, impartiality, and neutrality.

Over time CCR staff has learned that people often overestimate the significance of individual factors and underestimate the importance of systemic factors as contributors to their problems, conflicts, and concerns. Consequently, the types of questions the ombudsmen ask have evolved; they now ask questions designed to elicit information about the policies and practices, as well as the informal norms

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Scientists: The Nature and Function of Implicit Mediator Schema." (unpublished manuscript on file with authors).

77. *Id.* at 2.

78. Interview with CCR Ombuds, in Bethesda, Md. (Feb. 6, 2002) (on file with authors). Root cause analysis is discussed at greater length *infra* in Section IIIB.

and values of the work group within which the problems have arisen, and how they might be contributing to those very problems.

This attention to systemic factors puts the CCR ombuds in a different relation to disputants than mediators, the most common organizational conflict interveners. While ombuds share with mediators a commitment to helping the disputants pursue their interests, CCR ombuds recognize that achieving those interests almost always requires changes in several areas: the working relationship between the disputing parties, each party's understanding of the situation, and some aspects of the policies or practices that guide everyday interactions within the organization or one of its subunits.

B. A Taxonomy of Systemic Problems

Through the process of analysis, it became clear that each ombudsman was using the term "systemic" or "structural" to mean different things, and that in fact a problem could be systemic in different ways. [79] The authors also found themselves using the terms "systemic" and "structural" interchangeably, with subtle differences in emphasis. "Structural" was used to refer to patterns that were built into organizational routines, policies, or roles. "Systemic" was used more broadly to refer to any problem that was embedded in a set of ongoing relationships or interactions. Here, the authors have opted for the language of "systemic" problems, to maintain the analytic tension between problem identification and the level of intervention.

Before analyzing the relationship between individual conflict resolution and systemic change, it will be helpful to survey the indicators suggesting to the practitioner that a problem has a systemic source.

1. Analysis of Patterns: Recurring Problems, Parties, and Sites

The most straightforward clue to the systemic nature of a problem is that it recurs. Analysis of cases over time reveals patterns in the types or locations of problems, the identity of the parties, or the dynamics producing the case. CCR does an aggregate analysis somewhat systematically, by compiling data about the types of problems and their location.[80] They also identify patterns through their weekly reflective practice work, discussing cases or problems that pose particular challenges to the ombuds or might be of particular interest to the office as a whole. Examples of recurring problems that have been identified in this manner include: recurring disputes about scientific collaboration, problems stemming from personal relationships among partners or spouses in labs, and problems stemming from failure to provide feedback or supervision.

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79. *See generally* GHARAJADEGHI, *supra* note 17; Jones, *supra* note 17.

80. *See* Case Report Form, October 7, 2004 (on file with author). A Government Accounting Office report to Congress on ombuds organizations in Federal agencies noted that NIH was unique in keeping case statistics. NIH OFFICE OF THE OMBUDSMAN, THE CENTER FOR COOPERATIVE RESOLUTION, FY 2005 BUSINESS PLAN, 4 (2004) (citing U.S. General Accounting Office, Human Capital: The Role of Ombudsmen in Dispute Resolution (2001) (GAO-01-466), *available at* http://www.gao.gov/new.items/d01466.pdf).

Some institutes or work units are the site of a disproportionate number of conflicts or problems. Occasionally the problems involve the same individuals or managers within the site. Sometimes the problematic patterns are replicated among different players within a work site. A site with a high rate of conflict that cannot be constructively addressed can trigger an inquiry about the underlying causes of these problems.

2. *Policy Problems, Ambiguities, or Gaps*

A second type of structural issue involves gaps or problems with formal policy. Sometimes problems occur because a rule or practice was developed without anticipating a particular type of consequence or situation. A dispute may arise that falls in the gray area of the policy and thus prompts confusion or arbitrariness. In many ways these are the easiest kind of structural case to address. Disputes or conflicts are traced to an ambiguity or gap in policy, which can be cured both for the individual and the organization through policy change. Gaps in policy may also produce recurring conflicts, such as around issues of family leave, for example. These policy gaps may also signal disagreements about organizational priorities or the inability of lower status employees to mobilize sufficient attention to the issues affecting them.

3. *Problems or Inequities Recurring within Identifiable Groups*

Issues involving race, gender, disability, age, and national origin also emerge as systemic issues. They recur, in part, because these groups experience a common set of dynamics and problems. For example, women scientists who are perceived as tokens within a predominantly male work group, in disciplines that are also predominantly male, face common experiences that are replicated across the agency. At times spousal relationships within labs surface as a source of recurring problems. In addition, there are large scale status differences within NIH that correlate with race. Labs are sometimes heavily identified with scientists from a particular country—the home country of the leader of the work group. This can create difficulties for lab workers from other nationalities or ethnic groups. Other non-demographic groups can also be identified as experiencing systemic problems. Contract employees, part-time employees, and post-doctoral fellows are among those for whom recurring problems signal issues in the underlying system.

Race and gender conflicts also recur because these are the categories of analysis that have legal protection and for which one can bring a complaint. To the extent that there is a mismatch between the way a problem is framed and how it is experienced, that mismatch is itself a systemic problem.

4. *Dysfunctional Management or Organizational Structures*

Some problems are rooted in the way the organization has structured the work itself. There may be insufficient accountability for decisions by those in positions of power. There may be a mismatch between organizational responsibilities (such as managing a work team) and professional incentives (such as pursuing funds and publishing articles). These work arrangements may heighten tensions between

workers of different status without providing mechanisms for participation or for addressing the resulting problems. The work unit may also systematically fail to promote information flow and collaboration, both of which are crucial to accomplishing the work.

5. *Major Organization-Wide Initiatives, Crises, or Disruptions*

Major events or crises can create systemic issues or problems. As an agency of the federal government, NIH is subject to system-wide developments that can have major repercussions across the entire organization. One such development involves Executive Order A-76.[81] This order implements the current policy of the executive branch to privatize where possible by requiring all government services, other than those designated as inherently governmental, to demonstrate that their team is the most efficient organization (MEO) for each activity. A-76 essentially requires every branch of the agency not designated as inherently governmental to demonstrate that it is more efficient to provide the service through government actors than to contract out to the private sector. A-76 has required an extensive review process, accompanied by considerable uncertainty and risk for those employees potentially affected. This process has led to reorganizations, downsizing of departments, and high turnover rates. It has had a major impact on the morale and staff composition of NIH, particular among the technical and service employees. As such, it has introduced system-wide issues, some of which lie beyond the control of NIH. In fact, any kind of high-level administrative change in leadership or general administration of the federal government produces yet more changes that ripple throughout the organization.

6. *Problems Rooted in the Surrounding Culture*

Systemic problems may also be rooted in cultural norms and practices of the surrounding environment. For example, some of the challenges facing NIH stem from the structure and culture of science, which is located in a broader institutional and professional environment, which in turn shapes relationships and conflicts among scientists. Some of the hierarchies that create conflicts and problems stem from relationships that are structured by the larger discipline or profession. The fact that science and technology are constantly changing, and that new scientists do a substantial portion of the hands-on work in the lab, creates structural problems for veteran scientists, who are always at risk of being bypassed by new techniques, findings, and discoveries. Collaborators have to contend with the fact that most people have been educated and continue to operate within a particular discipline, while contemporary biomedical research is increasingly inter-disciplinary. The financial and reputational reward structures for scientists may encourage behavior that is inconsistent with professional, ethical, or legal norms. Bureaucratic processes frequently clash with those used to conduct scientific research. A bureaucracy is rule-bound, emphasizing standardization and routiniza-

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81. Executive Office of the President, OMB, (May 29, 2003), http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf; National Institutes of Health, Office of Management Assessment, A-76 and Fair Act, http://a-76.nih.gov/.

tion. This bureaucratic sensibility is very different than the scientific sensibility, which does not necessarily follow a chain of command, emphasizes creativity, resists being told what to do, and features independent thinkers who are accustomed to a lot of control over their work and work conditions, and who thus may without malice aforethought break the rules.

Our discussions also revealed a repertoire of responses to problems imposed by structural features of the bureaucracy; these responses include frustration and avoidance, acknowledgement, referral, reframing the understanding of the protagonists, reframing the contours of the problem solving process, creating occasions for addressing structural problems at different levels of the institution, facilitating interactions, training and capacity building, developing tools for internal and external use in ongoing problem solving, forming new partnerships or institutional relationships, and facilitating institutional creation or redesign.

C. Developing a Conflict Resolution Matrix

CCR's methodology places conflict resolution in the context of a problem-solving process. The conflict resolution/problem-solving process can be understood to involve two distinct but deeply intertwined components: analysis and intervention. Analysis includes defining, framing and diagnosing the problem. Intervention includes generating solutions, selecting a course of action, and implementing those decisions.[82] These components of the work do not necessarily operate in stages. In fact, both in any discrete case and over time, conflict resolution moves back and forth from diagnosis to intervention to re-analysis of the problem and redefinition of the possible interventions. Conflict resolution as it is practiced by CCR involves a dynamic relationship between inquiry and intervention.

A matrix usefully organizes inquiry about the relationship between individual and systemic problems within the different components of conflict resolution. As the researchers examined how systemic issues arose in a series of cases, they found it necessary to assess the individual or systemic character of their decision making for each component of the conflict resolution process. The problem analysis could be individual or systemic, and the intervention performed could also be individual or systemic. This realization initially led to the placement of analysis in the context of a two-by-two matrix, with the component of the conflict resolution process on one axis and the quality of the conflict as individual or systemic on the other, as depicted below.

Analysis and Intervention Matrix

	Individual	Systemic
Analysis		
Intervention		

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82. *See* MacDuffie, *supra* note 17, at 481.

Figure 1

Examination of a series of cases revealed that the level of analysis (individual or systemic) frequently differs from the level of intervention. The analysis could be systemic and the intervention could nonetheless be individual, and vice versa. Also, the understanding of a problem as individual or systemic—and the capacity to intervene systemically—changes over time. This realization led to the development of a matrix charting the relationship between the level of analysis and the level of intervention. This conflict resolution matrix structures inquiry to reveal which combination of analysis and intervention is operating at different points of the process:

Conflict Resolution Matrix

Quadrant I Individual Analysis/ Individual Intervention	*Quadrant III* Systemic Analysis/ Individual Intervention
Quadrant II Individual Analysis/ Systemic Intervention	*Quadrant IV* Systemic Analysis/ Systemic Intervention

Figure 2

Analyzing a series of problems through the lens of this matrix exposes the types of problems that are more or less amenable to systemic intervention through conflict resolution. It highlights the implications of using a systemic frame to analyze problems that are not amenable to systemic intervention. This framework also provides a schematic to track the movement of cases over time from one cell of the matrix to another. The matrix is not intended to suggest that cases can be compartmentalized as individual or systemic, but rather to facilitate understanding of how the work moves back and forth from one combination of analysis and intervention to another. This framework also focuses attention on the processes that build capacity to address problems at a systemic or structural level.

What follows is an application of this framework to particular problems that were handled by CCR. This analysis provides examples showing the linkage of individual and systemic work. These examples will be used in subsequent sections as a springboard for reconsidering the prevailing assumptions about conflict resolution's efficacy and legitimacy.[83] Discussion of each quadrant of the matrix will begin with an individual case, mirroring the typical manner in which issues come to the attention of the office.[84] People who come to the office are looking for assistance in addressing a specific situation affecting their work. In each cell we then illustrate how CCR moves from analyzing individual case dynamics to a broader systemic analysis.

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83. *See infra* Sections III-IV.

84. These case studies are drawn from multiple CCR case review meetings that were observed by the authors or their researchers. Some details have been withheld to preserve confidentiality. Case reviews and interviews, Office of the Ombudsman/Center for Cooperative Resolution, National Institutes of Health, Department of Health and Human Services, in Bethesda, Md. (Feb. 2001–Jun. 2005) (on file with authors).

1. Individual Analysis, Individual Intervention

The spurned scientist. Consider the following example from a case review meeting: John, an established and well-known staff scientist with an international reputation, came to CCR complaining that he was treated unfairly by a search committee. He had applied for a position as a scientist at another NIH institute and was not selected. He gave a seminar, and then was not asked to interview for the position. He claimed that the search process was unfair, and that the search committee was biased in favor of an internal candidate. John based his conclusion on the fact that he has a higher profile and more publications in the relevant field than the candidate selected for the position. Although he was not a native-born American and spoke with an accent, he did not suggest that national origin had played a role in the decision-making process.

With John's permission, the ombudsman spoke with Tom, the individual to whom the search committee made its recommendation and who made the job offer. Tom had met with John about why he was not selected, and had taken seriously John's concern that the search process might not have been fair. Tom had undertaken an extensive investigation of the decision-making process. He interviewed everyone on the search committee as well as the people who had attended the presentation. He determined that the decision not to interview John was based on an assessment of the quality of the seminar and the candidate's reference letters. The consensus among everyone interviewed, confirmed by a review of the presentation, was that John was not a creative scientist, and that creativity was a key criterion for the new position. This kind of creativity was not a significant component of John's current position, but would be crucial for success in the new one. The scientist selected was known for his creativity, even though he did not have as many publications in the field as John. Tom also learned that John got along with his lab chief, and was secure in his current position. Based on this review, Tom concluded that the process was thorough, fair, and justified. He communicated this to John.

The ombudsman assigned to the case reviewed the record and spoke with John and Tom, as well as other decision makers involved with the case. The ombudsman agreed with Tom's general assessment of the selection process and also noted that the criteria used to reach the decision were well-specified and fairly applied. The problem was traced not to issues with the adequacy of the process (which was well-executed) or with bias having to do with national origin (which was never mentioned by the complainant and did not correspond to any pattern of decision making within the office). Nor did the inquiry reveal any issues with the quality of feedback or supervision within John's work-group. He had received considerable mentoring, coaching, feedback, and support. The ongoing conflict was traced to John's personal characteristics that made it difficult for him to accept the decision. He assumed that because he was a well-known and established scientist, he was the best qualified for the job. He was having a hard time coming to grips with his own qualifications. He was considering a more formal complaint, which he could assert both by raising the issue with the top level administrators at NIH and by filing an EEO complaint. In the early stages of the process, the ombuds officer tried coaching, to communicate to John that there might be unrecognized aspects of his style and actions that were working against him. John was not able or willing to engage in self-reflection as part of this process, and the

ombudsman's goal became to direct John toward a formal process that could produce a fair and definitive resolution of his challenge to the search process.

This case illustrates the first cell of the matrix: an individual diagnosis, prompting an individual intervention. Although the type of decision at issue is a recurring one, inquiry revealed no apparent problems with the process used to reach the decision or the criteria that were applied. Nor was John's lack of success in this process indicative of more general patterns of non-performance or non-supervision. Resolution of this problem would occur through activities directed at resolving the individual conflict, whether by informal coaching by CCR, or by formal decision by the EEO. Although case review raised questions about the appropriate role and responsibility of CCR in working with people who lacked the capacity to reflect about their own behavior, it did not produce any systemic insights or interventions.

2. *Individual Conflict, Systemic Intervention*

The troubled employee. Consider a second type of problem that came up numerous times during case review: employees with serious psychological or health conditions that give rise to performance or disciplinary issues. An employee came to CCR to challenge a letter of reprimand issued because of bizarre and disturbing behavior attributed to him at the worksite. The behavior was of a kind that strongly suggested the employee had mental health problems. The employee wanted the letter of reprimand removed from his file. There was no dispute that the behavior was serious and offensive enough to warrant disciplinary action, but the employee had initially denied taking the action. At the time, the employee was receiving counseling from the Employee Assistance Program (EAP). Interactions with the employee, along with discussions with his co-workers and supervisors, indicated that the employee had serious psychological issues that were creating disruptions within his work group, but that he was otherwise competent at his job. At first glance, these problems look like quintessential individual conflicts, or at least situations involving systems that are beyond the scope of organizational intervention. CCR's work showed, however, that systemic interventions could be developed to improve the organization's capacity to address individual cases.

The work began with an inquiry to verify that the process used to determine the employee's involvement was thorough and fair, and that the problems most likely stemmed from the employee's psychological issues. This inquiry raised issues about how the organization handled problems of this character. It revealed an ongoing relationship with the EAP counselor, to whom the ombudsman regularly refers cases involving very pathological employees who are willing to seek counseling. Experience showed that this particular counselor had been extremely effective in providing counseling services in such cases. The ombudsman also explored how best to utilize the different counselors within the NIH system. This process enabled the ombudsman to figure out a way to connect the letter of reprimand to a process for getting the employee psychological help in managing his behavior in the workplace, without breaching confidentiality. The client agreed that it made sense for the ombudsman to follow up with the EAP counselor, with whom the office worked regularly.

This inquiry led to a CCR discussion of the parallels between this case and cases involving violence at work, and particularly the importance of a recovery

period for employees in the affected work unit after such incidents. The ombudsmen shared and compared experiences involving several different cases and indicated the importance of addressing this issue more systemically. Two staff members suggested studies of reactions to violence at work, to be discussed at their journal club meeting. Another ombuds officer was asked to gather resources and information about the protocol for managing the aftermath. They then discussed how to look at the problem from their different disciplinary backgrounds (legal, organizational, psychological) and how that inquiry could help them in designing more effective organizational responses. They decided to invite the EAP counselors, including one who did her Ph.D. dissertation about the aftermath of traumatic events, to a discussion comparing this case with two other cases involving recovery in the workplace after trauma or extreme psychological problems.

Five months later, at case review, there was additional follow up. One ombudsman described an ongoing project with the same EAP counselor to develop role plays for helping people who do not want to or cannot help themselves. The group decided to bring in a psychiatrist who could evaluate several situations with a psychiatric element, and then help translate these evaluations into organizational interventions that were effective in addressing similar cases. They discussed the limitations of integrating this work into the handling of a specific ongoing case, because of the compelling nature of the immediate issues and the personalities involved. They were searching for and identifying systemic ways to equip groups to deal with people with mental health problems.

These discussions also prompted the questioning of prevailing norms at NIH. Sometimes, co-workers or supervisors want to discipline, transfer, or fire employees because they do not conform to perceived civility norms. CCR raised the question of how and the extent to which a bureaucracy could tolerate eccentric behavior, and whether there was a double standard for the range of acceptability depending on one's status in the organization. The analysis also revealed the cultural roots of certain norms, such as whether one is loud or quiet in one's interactions at work. It showed ways to create contexts where work groups could actively negotiate about the prevailing norms. These issues were raised not only with participants in particular disputes, but also with those in a position to set relevant policy, such as human resources officials.

Cases like the one above exemplify individual conflicts involving repeated problems rooted in psychological or family systems located outside work, but that present recurring challenges to the organization. The systemic intervention consists of building the organization's capacity to work with and accommodate problems that are rooted in individual dysfunctions that are not uncommon among a large group of workers. These systemic interventions can produce new norms and processes for responding to problems existing independent of the workplace that affect employees' ability to perform. These norms and processes build organizational capacity to handle conflict constructively, to structure work effectively, and to provide support both to the individual and to his or her co-workers.

Also, once these individual issues are placed in a systemic frame, they can reveal and make accessible recurring problems affecting many employees. For example, carpal tunnel cases often reveal potential problems with how work is being performed or how offices are set up. Although the problems are experienced most intensively by those with carpal tunnel syndrome, they can compromise the health and productivity of a larger group of employees. The solution to

the individual problem may require or prompt redesign of office equipment or reallocation of work responsibilities, which will address the individual problem and potentially generate improvements in more general office practices.

Sometimes dysfunctions in the organization that affect everyone are only raised by those with heightened sensitivity to unfair or arbitrary treatment. Particularly when that treatment involves offices operating within separate units of the organization with little cross-institutional interaction at a policy level, these problems can be difficult to identify and address. For example, CCR has had cases that raised problems about the relationship between the police on the NIH campus and the professional staff.

If those systemic issues are ones that cannot be addressed, either in the context of the particular dispute or at their root, then the problem gets resolved at the individual level, either by equipping the "difficult" individuals with the tools to cope with an organizational problem or by removing the difficult individual if that person's behavior violates important work norms and resists behavioral change. Prompted by recurring cases of the kind exemplified in this case study, CCR is now working with managers to identify triggers that bring out this behavior and steps that could be taken to reduce paranoia or other expressions of mental illness. One ombudsman is putting together a list of nearby psychiatrists with particular specialties. CCR has facilitated discussions about how to improve the process of referral to outside counseling, the relationship between psychological evaluation for disciplinary purposes and psychological referrals for therapeutic purposes, as well as how best to structure the ongoing relationship with the EAP counselor within the constraints of confidentiality and roles.

An organizational response emerged from CCR's exposure, through case analysis, to the communication and coordination gap among the various offices that might be involved in addressing the behavior of violent or unstable employees. CCR urged the formation of an informal group of people, involving representatives from the full range of offices that might have some role to play. The group formed and began to meet on a regular basis, with the idea of conducting follow-up in particular instances and brainstorming about an effective coordinated response. This process led to two systemic changes: (1) a clearly formulated and widely distributed policy about violence; and (2) the establishment of a specialized office to handle these kinds of problems. This office became the central contact point for people who had any concern about violence or potential for violence in the workplace. It now has the responsibility and the expertise to convene the appropriate actors to discuss individual situations and develop an intervention plan. Managers and employees alike can appear before this group asking for guidance and assistance. By comparison to the chaos that existed beforehand, this program is quite an improvement.

3. *Structural Problem, Individual Intervention*

The under-appreciated, black employee. A black male employee working in a technical position came to CCR with a concern that he was being treated unfairly. Although he had always received a satisfactory job rating, he was not receiving promotions at the same rate as comparable employees. He was rarely praised for his performance and was denied tuition reimbursement for work-related courses he was taking on his own time while working toward a college

degree. He came to CCR after being written up for losing his temper during an interaction with another employee who had asked for his help on a technical matter that was a part of his job responsibility. Although he believed that race was the primary reason for his past unfair treatment, he did not want to pursue an EEO complaint about the disciplinary action because he did not believe that his race was a factor in his current supervisor's decision making. The manager who had written him up was a relatively new supervisor in his work unit, and the employee believed they had a good working relationship that might be damaged if he filed a formal complaint. Ironically, the write-up for the incident was one of the rare occasions when he had received direct feedback. In this case, the employee believed that his new supervisor was one of the few people who might understand why he felt that his previous supervisors had been unfair to him because of race. He asked CCR to facilitate a discussion with this supervisor, the very person who had written him up for the incident. Although he wanted to discuss the disciplinary action, he was more concerned about discussing the history of past injustices with his supervisor.

This case illustrates the third quadrant of the matrix, which involves problems that have been identified as systemic, but which are nonetheless addressed through an intervention focused on the individual issues or parties to the presenting conflict. These are situations in which CCR determines that the problem, although systemic in character, cannot or should not currently be addressed at its root cause. This occurs where CCR has unsuccessfully attempted a systemic intervention as well as in situations where the person whose complaint brought the problem to CCR's attention was unwilling to have the specific details of their case used as a link to the systemic issues.

This case illustrates a variety of interrelated systemic issues. Many of the cases handled by CCR can be traced back to an organizational culture in which issues, tensions, conflicts, and performance problems are overlooked until they blow up into crises. One important contributor to this structural problem derives from managers and supervisors who fail to provide ongoing feedback and criticism to employees about their work. The performance evaluation system in place at that time discouraged managers from providing such feedback to those whose work needed improvement, because it was a pass-fail system that did not require managers to differentiate among levels of acceptable performance.[85] At first, CCR believed that it was the pass-fail system itself that was responsible for the difficulties. Without regular opportunities for managers to provide critical feedback to employees, CCR found that employees interpreted such feedback in personal terms on those occasions when it was offered. In case analysis, the ombudsmen commented that many managers were reluctant to provide ongoing critical feedback—because they prefer to avoid conflict, or they do not invest adequate time in evaluating work, or they are worried that critical performance evaluations will prompt grievances. As a result, correctable problems persisted, and when the problems reached a more serious level, employees experienced the feedback as arbitrary and unfair.[86] However, as NIH moves to a four-point

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85. NIH OFFICE OF THE OMBUDSMAN, CENTER FOR COOPERATIVE RESOLUTION, ANNUAL REPORT 2000 18 (2000), *available at* http://www4.od.nih.gov/ccr/fy00annualrpt.pdf [hereinafter 2000 ANNUAL REPORT].
86. 1999 ANNUAL REPORT, *supra* note 64, at 10, 15.

evaluation system, there are early signs that the pass-fail system was merely an indicator, not a root cause, of the culture of managerial avoidance.

Racial dynamics interact in significant ways with this more general failure to provide ongoing feedback; often managerial avoidance is most extreme when managers and employees have different racial or ethnic identities.[87] CCR saw examples of managers who were particularly reluctant to give critical feedback to staff of color. In some instances, this was because managers seemed uncomfortable communicating about problems and did not have close enough working relationships to overcome this discomfort. Adding to their discomfort was the fear that if they did give critical feedback, they might be regarded as racist. On the other side of this dynamic are employees who are not receiving the sort of critical guidance they need to improve their performance. In addition to not having the same opportunity to address shortcomings as their colleagues do, these employees often feel undervalued, leading to demoralization and withdrawal, which in turn makes the process of constructive criticism even less likely.[88] Then, when they are not given promotions, or when performance problems accumulate and become serious issues, they are ill-equipped to understand the criticisms.

The existing conflict resolution systems complicate efforts to address racial dynamics as a systemic problem. Overshadowing all employee-manager issues in the federal workplace is the EEO system. The federal government's EEO process, intended as a means of addressing discrimination in the workplace, has generated distrust and criticism from employees and managers alike.[89] Because employees perceive the EEO process as the only way to get management's attention, they may file discrimination claims to address problems that they may not see as primarily about discrimination.[90] Neither agencies nor managers want to be known as having a large number of EEO complaints. Many managers acknowledge that they avoid confronting workplace problems because they do not want to endure the various stresses and accusations associated with the EEO complaint process.[91] The discrimination frame also affects whether racial dynamics operating in a particular dispute will be identified and addressed. When problems are framed in terms of race, the issue becomes whether someone is a racist, and thus blameworthy. The anti-discrimination framework leads participants to ask the question: was race the determinative cause of this decision? If the answer is no, then race drops out of the analysis, even if racial dynamics are an important but not determinative element of the problem. The dynamics of cognitive bias and cultural exclusion may not be visible at the level of the individual case, and many people do not understand race in these terms.[92] Consequently, they lack the frameworks and language to deal with race as part of the larger issue.

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87. *See* Howard Gadlin, *Conflict Resolution, Cultural Differences, and the Culture of Racism*, 10 NEGOT. J. 33, 42 (1994).

88. *See id.* at 43.

89. *See* 2000 ANNUAL REPORT, *supra* note 85, at 18; *see also* Gourlay & Soderquist, *supra* note 29, at 262-63 (discussing delays in the federal EEO process affecting management and employees alike).

90. See Meltzer, *supra* note 32, for a description of a similar dynamic in other federal agencies.

91. *See ADR brief*, *supra* note 25, at 84; Gadlin, *supra* note 87, at 42-43.

92. *See* Linda Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-88 (1995), Barbara Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 326-27 (2000).

These micro-dynamics are reinforced by larger cultural and organizational patterns.[93] Black and Latino employees make up a small proportion of the scientists and scientific management—that is, the high status employees—and a much larger proportion of the technicians and service employees, who are the lower status employees.[94] This structural power difference produces racially-inflected tensions and dissatisfaction that would not meet the EEO definition of discrimination.[95] CCR has identified the need to diagnose and address racial issues outside the context of discrimination claims and with substantial support from high levels within the organization. Ironically, while NIH has many programs to recruit, retain, and promote minority scientists, these programs have limited success because they do not effectively address the structural barriers to diversifying the pool.[96]

CCR documented these concerns about racial dynamics in its annual report to the organization in 2000. The organization has proposed several initiatives to create a context in which NIH can address management issues at a more systemic level and undertake a process of institutional engagement around issues of race. Some of these efforts have been undertaken as part of resolving a particular case; others have been undertaken by CCR in its reporting or facilitating roles. However, many of the problems stemming from the culture of management and race within the organization have proven difficult to address at a systemic level. The same dynamics that produce the problem seem to short-circuit efforts to reconfigure roles and systems needed for integrated problem solving to occur. Discrete systems that now operate separately would need to operate interdependently. Workplace management would need to be seen and understood as an integral part of doing good science, and race and gender would have to be connected to the core work of the organization.[97]

Analysis of the casework and the systems intervention work shows that many of these systemic interventions have not been sustainable, or have not generated an adequate level of organizational engagement. Conflicts stemming from these deeply embedded organizational patterns are more likely to be resolved at the individual level. Sometimes the structural analysis is helpful in enabling individuals to de-personalize their problems and to find ways to work around the dynamics of management and race in their particular context. Sometimes identifying the structural problems only deepens the sense of frustration about the inability to respond. The case of the under-appreciated minority employee illustrates this point. His personal work history may or may not be an example of racial discrimination, but his awareness of the broader institutional problems around race

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93. *See* Kenneth Avruch, Integrating Ideas of Culture, Ethnicity and Multiculturalism into Conflict Resolution and ADR Practice (Aug. 6, 2002) (unpublished manuscript discussing the process and problems of identifying when culture is involved in a conflict) (on file with authors).

94. *See* OFFICE OF EQUAL OPPORTUNITY AND DIVERSITY MANAGEMENT, QUARTERLY REPORT, THIRD QUARTER FY 2006 482-94 (2006), *available at* http://oeo.od.nih.gov/policiesresources/sitesresources/QtrlyRpt3rdQtr06.pdf.

95. 2000 ANNUAL REPORT, *supra* note 85, at 20.

96. *See* Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equality in Higher Education*, 29 HARV. J.L. & GENDER 247, 302 (2006) [hereinafter Sturm, *Architecture of Inclusion*] (discussing how the National Science Foundation successfully incorporated diversity as a structural goal of the organization).

97. *Id.*

Conflict Resolution and Systemic Change

served to reinforce his own conviction that he, too, was being treated unfairly on the basis of race. Although he was certainly concerned about the systemic issues, his immediate interest was to address and improve his particular situation; that individual situation necessarily became the focus of the ombudsmen's work with the employee.

Cases also arise where the problem presents as an issue about the fairness of a particular decision or a conflict between two employees, but the discussion reveals underlying problems of inadequate accountability built into the structure of management responsibility. For example, one case involved an employee, Taylor, who was complaining about a decision to deny her leave. Taylor had followed the informal practice for requesting leave, although she had not actually submitted a formal request. In the past, the informal practice was sufficient, but this time, the leave was denied. The initial trigger for the problem was a conflict with another employee's leave request, and Taylor's perception that this employee was favored because of a personal relationship with Lee, the manager. The prior relationship dictated the outcome because Lee operated with unfettered discretion in the office and was not supervised or held accountable for any of her decisions. She regularly abused that authority. She was able to function without any accountability because her supervising scientist was focused on research, which was the aspect of the work for which scientists were valued, and did not spend much time on administration. The issue had not come to anyone's attention because the employees were afraid to complain to Lee's director, who delegated everything to the manager, so the issue would simply find its way back to Lee. Employees were concerned that Lee would retaliate against anyone who raised issues about the manager's performance. This problem can be particularly difficult to prevent when race and gender differences are involved in the interaction.

CCR traced these management problems to several deeply embedded organizational practices—the system for evaluating employees, the fear of grievances that discourage managers from giving ongoing feedback, the lack of effective systems for addressing conflict within the work group, and the silo structure for managing science.[98] In the context of particular work groups, CCR has been able to reframe individual conflicts to make visible the underlying problems with the structure of leadership. For example, through group facilitation, CCR has changed the frame for understanding a case from a problem with a particular worker to a problem with the communication and feedback from the leadership and inadequate mechanisms for raising issues within the work group. When this reframing occurs, it has prompted the development of communication norms and processes for raising issues and taking stock within the work group. This work typically occurs within the confines of a particular lab, branch, or program, and does not typically generalize across the organization. This is not necessarily problematic because the solutions generated often need to be tailored to a particular micro-culture within the larger organization.

When management issues cannot be addressed within the context of the work group, structural interventions have not taken root. Efforts to intervene at an organizational level concerning the issues of management culture have proven more

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98. This decentralized structure creates distinct work groups with separate governance structures and little communication with other departments, laboratories, and projects involved in related work.

challenging. CCR has brought these dynamics to the attention of the organization, and attempted several major initiatives that would enable the organization to address the problem through organizational redesign. Interventions to improve the fairness and efficacy of management within particular units have sometimes worked, including efforts to create governance systems that construct learning relationships at the outset of new collaborations or programs. CCR has reported that efforts to deal with these problems at the overall organizational level have yet to materialize.

The capacity to address structural problems at a structural level is itself dynamic and changing. In effect, CCR did a root cause analysis of why their efforts to engage management in addressing management culture failed. They also looked at other arenas where serious problems occurred and became an occasion to improve practice. They determined that although there was resistance to addressing the cultural or managerial dynamics head on, CCR could enlist organizational leaders in a process of self-reflection about their failures. This process might then lead the actors themselves to identify the roots of the recurring problems, and enlist them in making more structural changes. Howard Gadlin recently proposed to the executive officers, the highest level of non-scientific managers, that they participate regularly in a kind of morbidity and mortality (M & M) review like those used in hospitals to address iatrogenic failures.[99] This intervention moves beyond employee- or manager-initiated conflict as the trigger for root cause analysis. Nothing compelled the executive officers to respond favorably to this proposal. But more than half of the executive officers attended the first M & M that CCR hosted. CCR is now conducting M & M sessions on a regular basis. The office will be taking difficult cases, where the outcome of a managerial action was different than intended, and guiding the executive officers through a root cause analysis. Instead of having that analysis done within CCR, groups of organizational actors will conduct the analysis, with the facilitation of CCR.

The move to the systemic level seems to generate the most engaged organizational response when it is driven by the demands of science, particularly in the context of scientific collaboration at different levels of activity that require reconfiguring relationships to produce successful scientific work. This is the domain in which CCR has been most successful in addressing systemic problems through systemic intervention.

The problems described in this section illustrate quadrant III of the matrix— where problems are diagnosed as systemic but addressed only at the individual level. This quadrant most vividly highlights a potential gap between the levels of analysis and intervention.[100] The possibility of such a gap, though inelegant and destabilizing, is important. Participants in the conflict can raise systemic issues without committing themselves to undertaking them before they have fully assessed the costs, risks, and potential for success. This possibility reduces the risks and costs associated with asking the systems question. The gap between analysis and intervention also marks a problem as systemic, and thus changes how the problem will be perceived when it recurs. Quadrant III is where one sees the con-

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99. *See* Gawande, *supra* note 75; *see also* Laura M. Lee, Root Cause Analysis, Feb. 24, 2006 (unpublished presentation on file with author).
100. *See supra* Figure 2. Conflict Resolution Matrix.

sequences of failing to address systemic problems. These failures are not just abstractions, but insistent problems affecting the quality of work and the quality of life within the organization. The process of developing a systemic diagnosis develops knowledge about the problem. It also gradually builds understanding of the need for change among different stakeholders within the organization. As CCR's root cause analysis of management culture illustrates, the capacity and openness for systems change can thus develop over time.

4. *Structural Problem, Structural Intervention*

The failed collaboration. Early in the history of CCR two scientists asked for help in resolving a dispute over the order of authorship for a paper they were about to publish. Each believed that he deserved to be the first author, typically the position that gives one the most recognition. In the course of working with the two scientists, the ombudsman was struck by the absence of personal animosity between them. In addition, when inquiring about the origins of the dispute, the ombudsman learned that the scientists had not discussed their mutual expectations when they began their collaboration. Sharing an interest in the research topic and recognizing the complementary nature of their respective areas of expertise and abilities, they had simply assumed all would work out. They had not discussed the question of authorship or how they would handle the regular transactions and decisions that are part of collaborative research. Building on the strong personal and scientific bond between the two, the ombudsman was able to resolve the matter by helping them identify some independent criteria by which the authorship matter could be fairly decided. In the course of many interactions with scientists, CCR learned that it was fairly common for scientists to begin collaborations without making explicit their expectations of one another, and without developing a process for resolving any differences that might arise. Often these collaborations involved individuals with unequal status and power. The case of the failed collaboration alerted CCR to the potential value of intervening at a systemic level to address systemic issues embedded in work routines and the culture of science.

This case illustrates the final quadrant of the matrix, which involves systemic problems that are addressed by systemic solutions. These are problems that come to be understood as systemic, and for which interventions match the level of analysis. The area of scientific collaboration offers an example of a problem that, through its case work, CCR has come to understand as systemic and has been able to provide multi-level interventions that reach those systemic dimensions.

Collaboration lies at the center of much scientific work. Collaborations involve scientists who are peers, as well as those at different stages of their careers. A host of issues can erupt in the course of these collaborations, including issues of authorship, ownership of data, and the scope and direction of the research. These issues can be particularly fraught when they arise in the context of a mentoring relationship between a post doctoral fellow and a staff scientist. The issue of problematic relationships between post docs and mentors is a recurring one, arising over and over again in CCR's individual cases. Gender, racial, ethnic, and

cultural differences can further complicate the problems that almost inevitably arise in the course of the relationship.[101]

Over time, CCR has learned the ways in which these issues are built into the structure of the relationship, and also lie at the center of core scientific goals. Collaboration among scientists with different levels of experience and expertise lies at the heart of NIH's mission. But it also carries with it built-in tensions, issues, and opportunities for abuse of power. "There is a fundamental imbalance in the relationships between post docs and lab chiefs. We can do things to mitigate that, but we can never change the basic situation."[102] The challenge is to figure out how one does work with this power differential for which there is no cure. Gender, race, and national origin can intersect with mentoring issues. The dynamics that produce conflicts and unfair outcomes also affect the capacities and trust of the parties in negotiating resolutions to those conflicts. So, working out the specific problems depends in part on addressing the conditions producing that conflict—creating an atmosphere of trust, building the capacity of the low-power party to negotiate effectively, articulating principles for the relationship that everyone agrees to, and providing some form of accountability for the way the relationship proceeds. Issues that have come up in this relationship include conflicts about the direction of the research, use and ownership of the data, who owns the data, authorship, exchange of biological materials, and whether post doctoral fellows can take data or research with them when they leave NIH. Complicating this issue is the fact that the post doc is dependent upon the mentor for professional development and future positions.

So, for example, some cases involve postdoctoral fellows recruited to work in labs on collaborative projects, who are given then inadequate support and feedback, and because they do not "rise to the challenge," come to be viewed as a "warm body" who can perform routine work, but who will never advance. The resulting conflicts are often interpreted as personality issues. Some cases have raised issues about favored fellows in the lab, sometimes because the post docs are from the same country or region as the leadership, and speak the same language or dialect. Sometimes the relationship is further complicated by gender dynamics, particularly when women are not well-integrated into the social relationships of the lab.[103] Issues also come up in other cases about authorship. There are disagreements about whether the post doc should be included as an author, and if so, whether they should be first, second or third author. Fellows often interpret this decision as a power play by the senior scientist. Gender and sometimes national origin may also come into play in shaping how managers interpret the cause of the problems.

Over time, CCR has intervened in hundreds of cases involving conflicts about scientific collaboration. They have acquired a sophisticated understanding of the evolution and structure of these conflicts. They also have developed strategies for enabling collaborators to identify their underlying goals and develop a structure and set of principles to guide their work. They essentially help scientists create a

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101. *See generally* KATHY BARON, AT THE HELM: A LABORATORY NAVIGATOR (2002).
102. Interview with CCR Ombuds, in Bethesda, Md. (Jan. 8, 2004) (on file with authors).
103. *Id.*

"constitution" to guide their activities.[104] Mostly, this constitution involves a set of processes or questions that the parties would be required to work through as part of constituting their relationship. But CCR also developed over time an understanding of some of the shared norms governing collaborations among different types of scientists that could help parties to structure fair arrangements for matters such as sharing data and determining authorship.

CCR hypothesized that many disputes could be avoided and collaborations made more productive and fair from the outset if the participants actively addressed the structure of their relationship. By developing a protocol to help collaborators establish a framework for their working relationship, they were able to structure a set of processes and principles for addressing unanticipated conflicts or problems that arise over the course of the relationship.

Initially, CCR used this structure in working with people who were already in conflict. They subsequently developed a tool that could be used prospectively, and made that template available on the NIH website.[105] They wrote articles and gave talks about the use of collaboration agreements.[106] Scientists and institute directors learned of these presentations, and began to explore the use of collaboration agreements in redirecting dysfunctional collaborations and as a way to set up fair and effective working relationships from the outset. They invited the ombudsmen to develop materials for general use and for training purposes, and to participate in the orientation and training of new post docs and mentors. The ombudsmen were then invited to facilitate retreats for those work groups interested in using the collaboration agreement as a framework for their working relationships. They used these occasions, as well as the principles and processes developed through their conflict resolution work, to facilitate the development of a set of norms and processes governing collaboration within particular work groups. As collaboration has become more and more central to the NIH's sense of the future of science, the work generated through the collaboration agreements has expanded in its scope and impact. Most recently, CCR worked with a group of scientists who used the collaboration agreement framework to develop a research center designed to facilitate collaboration among scientists from several different institutes.

These collaboration agreements help scientists formulate a set of norms for practice, as well as institutionalize processes that structure communication and interaction to prevent or address future problems. Through the device of collaboration agreements utilized at different levels of organizational practice, CCR is engaged in making explicit a set of implicit or underspecified norms and in articulating a set of norms where none have existed. Many of these norms have been understood and expressed idiosyncratically—for example, the basis of trust in a scientific relationship. When scientists enter into a collaboration project, they take certain things for granted, although these understandings often remain implicit and there is little beyond professional socialization to hold people account-

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104. *See* Howard Gadlin & Kevin Jessar, *Preempting Discord: Prenuptial Agreements for Scientists*, THE NIH CATALYST, May-June 2002, *available at* http://www.nih.gov/catalyst/2002/02.05.01/page6.html.
105. *See* Ombudsman, Questions for Scientific Collaborators, http://www4.od.nih.gov/ccr/collab.html.
106. *See, e.g.*, Gadlin & Jessar, *supra* note 104.

able for adhering to them. Scientists are trying to negotiate the complexities both of the scientific work and the working relationship. They often agree in principle with norms providing that data will be fully shared and exchanged, communication will be balanced, decisions should be made mutually and based on the power of argument rather than the power of position, and credit is supposed to be allocated fairly. These understandings are filtered through scientific discourse as well as through the power dynamics in the collaborative relationship. Scientists typically do not think about the relational dimensions of their collaboration. They are thinking primarily about the science and the need to publish, enhance reputations, and advance knowledge. They must depend upon each other for their individual areas of expertise. Uniform rules specified in advance will not necessarily match the particular fairness issues that arise in the course of the collaboration. The goal motivating collaboration agreements is for public understandings and practices to prevent extreme situations of abuse, and for applicable norms to connect in a meaningful way to the day-to-day dilemmas that people face in their collaborations.

When the sharing or exchange of biological materials is involved, scientists are required by law to enter into a formal agreement about the exchange of biological samples,[107] but formal law does not address the full range of potential problems that often arise in the interaction among people with different perspectives and power. By institutionalizing the practice of using collaboration agreements, CCR is exemplifying law as a set of practices and institutional arrangements. It enables the creation of a normative framework and relationships of accountability for preventing and addressing wrongs that may not necessarily violate pre-specified rules or that can only be understood as problems in context. Public values, such as addressing power imbalances, minimizing the expression of bias, and fairly allocating credit, are enacted within the context of the collaborative relationship, with accountability provided through the norms generated by analyzing many other such relationships and through the involvement of third parties who can engage in identifying the source of problems that emerge in the context of practice.

The following example further illustrates the dynamic relationship between the individual case and systemic change. This example began with a case in which CCR was not intending to make a systemic intervention. The ombudsmen thought they needed to address the issues between the direct parties to the conflict before reaching the systemic questions clearly implicated. The case involved two scientists, one of whom was a lab chief to the other. Both are independent investigators with their own budget; the lab chief function is more administrative and *pro forma* than it is substantive. These two scientists were doing work in the same laboratory, though not in the same physical lab space. A variety of tensions developed between them. The junior person suspected that the senior person was working against his interests. The more senior person suspected that the more junior person was not willing to accept his role as lab chief and that the junior

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107. *See* CRADA, Cooperative Research and Development Agreement, which Congress required under the Federal Technology Transfer Act (FTTA). Exec. Order No. 12,591, Fed. Reg. 13,414 (April 22, 1987), *reprinted in* 15 U.S.C. § 3710 et seq. (1986). *See* NIH Office of Tecnhology Transfer, What is CRADA?, *available at* http://www.ott.nih.gov/cradas/crada.html (description of CRADA and its use at NIH).

scientist did not like him. Distrust increased with every passing week, and with each decision that had to be reviewed. There were allegations that the junior scientist was keeping secrets about a scientific project from his colleagues. Although this did not necessarily violate any ethics or disciplinary rule, it did violate shared implicit norms within the lab. The issue of sharing information about research is an ongoing issue in every laboratory in which people are colleagues in the work but competitors in obtaining grants and advancing reputations. A lot of attention was paid to whether the secrecy warranted bringing ethical or misconduct charges, and a determination was ultimately made not to bring such charges.

The two scientists turned to CCR for help because the junior person was thinking about leaving, which would mean the end of the lab. Senior management did not want the lab to break up because it had a distinctive and valued configuration of expertise. They instructed the parties to try to find a way to resolve their antagonism, which was affecting others in the lab. The scientists were also of different nationalities and, though these issues were not at the center of conflict, they were affecting their capacity to communicate with each other. CCR talked with them about organizational issues affecting the whole program. Though the lab chief did not actually hire the junior scientist, the junior scientist had been placed in the lab chief's lab. The junior scientist's loyalties were thus to the person who hired him and, when unhappy, he would turn to this person, while the lab chief turned to a different superior for support or influence.

CCR had a series of discussions with them both separately and jointly. The goal was to forge an agreement that would explicitly lay out the terms of the relationship between the two scientists: what issues the lab chief could legitimately raise, how to schedule meetings between them, how requests for resources would be handled, how they would cope with possible competition in their research or for outside funding, how they would address conflicts, etc. It was clear to CCR that each issue was symbolic of the superordinate issues of power and autonomy.

This conflict produced a long and difficult negotiation. With each iteration of a possible agreement, CCR was finding the need to be more and more explicit and clear. The need for that kind of clarity made CCR doubt whether the parties would be able to uphold any agreement, no matter what the terms. The need for great detail pointed to an underlying distrust and dislike that was so profound that either party could find a violation of agreement based on a technical detail.

Although these negotiations were confidential, everyone in the program knew about the tension and conflict. Through the initiative of the junior person, these issues were raised as part of the planning of a retreat for their program. CCR had spoken with the parties about whether it would be useful if the program itself had specific guidelines about the role of a lab chief, as well as the role of a tenure track scientist working under that chief. While there are general guidelines about the roles of lab chief and principal investigator on the NIH website, they are so general that they do not help in preventing or addressing possible disputes. This policy issue, however, was set aside, and attention was instead focused on working out the particulars of a collaboration agreement between the lab chief and the scientist.

At the retreat, the two scientists brought up the general issue of the lab chief's role. The entire lab group wound up clarifying for the whole program almost all the issues that were posed in individual form for the two scientists. They also identified a set of additional issues or problems for which additional clarification

was necessary. They agreed to have follow-up meetings to generate lab-wide solutions. The junior scientist compiled and circulated notes from the meeting. The group tweaked the language, and produced a document reflecting their collective agreement and understanding among the group about how they will do business in the future. The two scientists who were parties to the original dispute then arranged a meeting with CCR to discuss these developments. Once these general agreements and processes were in place, the original disputants both felt they no longer needed a personal agreement addressed specifically to them. They felt their issues were more appropriately addressed through the structure that they had helped put in place for the whole lab. CCR observed that there was a level of relaxation and ease in their conversation not witnessed before. The protagonists' body language and tone of voice were different; they were speaking to each other rather than to the ombudsmen. They acknowledged that they still have a ways to go before they trusted each other, but felt that they had a fair and effective way to address their issues going forward.

CCR predicts that this intervention will have an impact on the whole program. It may spread through the culture as a model—not because it was adopted as a rule, but because it acknowledges the need for co-workers to be explicit and to have common norms to govern their interactions.

The kinds of norm elaboration within NIH described here also occur across organizational boundaries. The ombuds are part of larger professional groups that regularly share knowledge about their work. So, for example, Howard Gadlin is actively involved in shaping the practice of ombuds offices within the federal government and nationally. This framework for collaboration has been extended to other organizational environments.[108]

IV. THEORIZING THE FEATURES ENABLING INDIVIDUAL CONFLICT RESOLUTION AND SYSTEMIC CHANGE

The matrix developed in the previous section maps the dynamic relationship between individual and systemic conflict resolution. The examples documented here do not fit neatly into the conventional dichotomies that have governed the analysis of conflict resolution. They both resolve individual, private disputes *and* generate systemic solutions and public norms. The choice is not either/or, once-and-for-all, but when, under what circumstances, and how best to mediate the relationship between individual and systemic conflict resolution. Linking individual and systemic conflict resolution, when structured to assure accountability and independence, enhances the capacity to produce successful individual outcomes *and* systemic improvements. Conflict resolution in these examples is thus simultaneously informal and formal, problem-solving and norm generating, private and public, individual and systemic, collaborative and principled, and confidential and accountable.

The practical and theoretical significance of this example depends upon its generalizability in two senses. First, can the CCR case study be more broadly

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108. For example, CCR's "collaborative agreement" approach has been adopted by the University of Minnesota. *See* University of Minn., Student Conflict Resolution Center, http://www1.umn.edu/sos/Research/research.htm.

applied to other settings? Its success cannot depend upon the particular configuration of features present in this case study (i.e., a public agency devoted to science with an interdisciplinary office of highly respected conflict resolvers). Second, does the matrix analysis have broader theoretical implications for how conflict resolution advances rule-of-law values?

This section addresses these dimensions of generalizability. First, it extrapolates from CCR's work in order to identify the elements of a conflict resolution process that integrates conflict resolution and systemic change. These elements include: (1) a boundary-spanning institutional intermediary, (2) root cause methodology, (3) institutional legitimacy within relevant communities of practice, and (4) participatory accountability. This analysis provides a framework for critically evaluating the capacity of a conflict resolution program to link individual conflict resolution to systemic questions. It then shows that these elements are not unique to CCR or present in all (or even most) ombuds offices. Using a functional analysis, this section identifies programs with these features across the conflict resolution spectrum—in judicial settings, administrative agencies, and some privately managed, publicly charged conflict management systems.

A. A Boundary-Spanning, Institutional Intermediary

One of the qualities enabling a conflict resolution body to link individual and systemic work is its position as an institutional intermediary located at the intersection of multiple, interrelated systems. CCR occupies such a position; it is an embedded but independent office nested within one or more communities of practice.[109] CCR works with a variety of offices within NIH, and also works with employees who interact with those same offices in the context of doing the work. They are thus in a position to observe patterns in the way different offices perform their role, in the types of tensions and conflicts within those offices, and in their interactions with others. Sometimes, these patterns can be traced to the way a particular office is organized. Because CCR can observe similar dynamics across different cases involving the same office, it can sometimes trace the roots of organizational conflicts and dysfunctional relationships among offices within NIH.

Institutional intermediaries address problems arising within defined systems that involve repeat players whose conduct affects those within the system, even if they do not regularly and directly interact. Their boundary-spanning position affords access and knowledge concerning the range of problems that arise within that overall system. Because they operate within defined practice domains, over

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109. Communities of practice are groups of people who "are active participants in the practices of a social community," interact with each other on a regular basis, and construct their activities and identities in relation to that community. ETIENNE WENGER, COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY 4 (1998). They could include a unit of an organization, a work group, or a professional association. These social groupings could also be considered norm communities–groups of people who cooperate and compete, and in the process generate and enforce norms. *See* Robert Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PENN. L. REV. 1643, 1645 (defining a community as "a social network whose members develop relationships with each other through repeated interactions."); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORHOODS SETTLE DISPUTES (1991). *See* Sturm, *Architecture of Inclusion*, *supra* note 96, at 312-22 (discussion of the role of institutional intermediaries outside conflict resolution).

time they confront problems that recur within that domain. Institutional intermediaries also interact with and have an opportunity to observe repeat players over time. They operate at the intersection of multiple governance systems, seeing the relationships among those systems. By working with these "communities of practice," they are in a position to generate norms, processes, and remedies that have an impact beyond a particular case.[110] They also cultivate communities of practice as learning systems.[111]

Crucially, institutional intermediaries are both embedded and independent. They are located outside the normal chain-of-command, and they work with actors in many different parts of the system. Institutional intermediaries do not have particular governance or organizational duties that tie them to particular routines or lines of authority. They operate independent of outside supervision over how they define and address problems. CCR, for example, is set up to foster trust in its independence, impartiality, and integrity. When he was brought in to create the program, Howard Gadlin was given full authority to establish an ombuds office according to the vision and practice that he believed would be successful. The office's independence has been part of the social pact with the organization, and is built into the cultural understandings and routines of the organization since CCR's inception. No one is permitted to dictate what CCR works on, who they speak to, how they do their work, or what they recommend. This insider/outsider status is one important factor positioning the office to connect conflict resolution to structural intervention over time.

Institutional intermediaries' boundary-spanning location and role equips them to connect information, people, and problems.[112] This position at the nodal point of multiple systems provides a vantage point for observing patterns and bringing that knowledge to bear on particular problems. The capacity to understand and identify systemic problems develops over time from individual case work. Conversely, the capacity to understand and address individual conflicts requires a systemic understanding that comes from the opportunity to step back and address problems outside the context of a particular conflict. An intermediary's effective involvement in one context often produces occasions to address similar problems that arise at another time or location. This work produces cultural and institutional knowledge that intermediaries can draw on over time in spotting patterns, analyzing dynamics, and enlisting participation of relevant actors. This permits different forms of aggregation, which can be tailored to the nature of the problem as well as the pragmatic opportunities for intervention.

Institutional intermediaries are in a position to work at the level of the organization and with the parties that fit the contours of the conflict or problem. They can bring people to the table who do not ordinarily work together and do not otherwise have easy access to each other. A case may be resolved in the short run at the level of the individual, with no immediate consideration of its systemic implications. Institutional intermediaries can use information obtained in the context of an individual case to understand and design solutions for systemic problems when the opportunity to do so arises. They utilize a range of intervention strategies,

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110. *Cf.* Amitai Aviram, *Regulation by Networks,* 2003 B.Y.U.L. REV. 1179 (2003).
111. *See* WENGER, *supra* note 108, at 15-17.
112. *Cf.* MALCOLM GLADWELL, THE TIPPING POINT 46-59 (2000) (describing the important role of connectors in promoting change).

which give them considerable flexibility and scope. For example, CCR's response to "the failed collaboration" included individual case intervention, development of a template for collaboration agreements, training, and facilitation of group problem solving, organizational analysis and system redesign. The multiple roles performed by CCR afford the opportunity to connect problems learned through individual case work to systemic change. Its mandate and range of intervention strategies provided the access and the tools to calibrate its intervention to the appropriate level.

The impact of institutional intermediaries is multiplied when they are located within different communities of practice. For example, CCR is nested within the decentralized institutes operating within NIH. It is in a position to interact with groups of people who occupy the same professional position, such as scientists, institute directors, and nurses. It is also part of the network of federal, university, and national ombuds offices, and thus is in a position to diffuse its practices to those communities.[113] CCR staff members regularly speak at conferences and workshops about their approach linking individual and systemic change.[114] The scientists with whom CCR works are accountable to broader professional communities, as well as a university network that is either directly or indirectly accountable to NIH as a grantee. As such, CCR's role as a conflict resolution intermediary can have a cascading effect on an interrelated set of norm communities, even though its formal mandate is limited to addressing conflicts that arise among in-house NIH employees.

CCR exemplifies an institutional intermediary located within a formal organization, as well as within several professional norm communities. However, this institutional intermediary role is not limited to internal conflict resolvers. Any conflict resolution office that operates within an ongoing normative system, at the nodal points of interlocking systems, could potentially operate as an institutional intermediary able to integrate individual and systemic change.

Courts that focus on specialized areas of practice within defined geographic communities can play this role. For example, criminal courts can be in a position to identify systemic problems emerging across a variety of cases, to step out of the conflict resolution mode, and to develop systemic solutions to address those problems. Brandon Garrett has described this form of systemic intervention in the criminal justice system.[115] Garrett observes that courts are repeat players in the criminal justice system, and that they "supervise the intersection of each of the other institutional actors in their courtrooms."[116] He documents recent innovations in which courts have aggregated information and prompted systemic reform,

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113. There is, for example, the United States ombudsman association, http://www.usombudsman.org/en/references/public_sector.cfm, the international ombudsman association, http://www.ombudsassociation.org/, and the ABA Ombudsman Committee, http://www.usombudsman.org/en/references/more_references/participation_on_aba_ombudsman_com mittee.cfm.

114. In fact, Howard Gadlin and Kevin Jassar are presenting at the Annual Conference of the International Ombudsman Association in April 2007. *See* International Ombudsman Association, 2d Annual Conference, http://www.ombudsassociation.org/conference/documents/Conf_Finalrevd.2.pdf.

115. Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. (forthcoming 2007) (manuscript at 12), *available at* http://papers.ssrn.com/abstract=893552.

116. *Id.* at 13.

either themselves or through the involvement of third parties such as innocence commissions and expert panels.

Conflict resolution mechanisms, developed to address problems within particular service delivery systems, offer another example of an institutional intermediary. A recent article by Nan Hunter describes the development of external review systems set up to resolve disputes between patients and managed care organizations.[117] These processes have produced an intermediary body that has the (as yet unrealized) potential to integrate fair treatment of individual cases with system-wide concerns such as quality of care and fair allocation of health care resources. Administrative agencies, such as child welfare departments, have created third party intermediaries who use case analysis to reveal information about systemic breakdowns and to intervene at both the case and the systemic level as part of, and independent of, the process of individual conflict resolution.[118] These conflict resolution systems share the features of an institutional intermediary poised to integrate individual conflict resolution and systemic improvement. Interestingly, these examples illustrate the interrelationship and blurriness of the boundary between formal and informal approaches. Even courts, the epitome of formal process, are using the information gleaned through that adjudicative role to generate the possibility of systems change.

Conversely, many alternative dispute resolution and mediation offices are not set up to function as institutional intermediaries. Internal conflict resolution offices may be located within a particular sector or office, such as human resources, and they may be directly accountable to management.[119] They often have a more limited mandate and range of operation. Other offices are set up only to do mediation, and they do not interact with anyone in the agency outside the context of a particular individual conflict.[120] Many conflict resolution systems are not designed to enable the development of ongoing interactions among repeat players. More than half the time, outside mediators are selected from external panels to handle particular disputes.[121] By definition, these mediators lack institutional knowledge; nothing in their mandate or functioning equips them to obtain that knowledge through their casework or to provide feedback to the organization. Mediation performed in this way is non-norm-generating and non-systemic.

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117. Nan D. Hunter, *Managed Process, Due Care: Structures of Accountability in Health Care*, 6 YALE J. HEALTH POL'Y L. & ETHICS 93, 128-32 (2006); *see also* Norman Daniels & James Sabin, *Limits to Health Care: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurers*, 26 PHIL. & PUB. AFF. 303 (1997).

118. Department of Human Services, CPPC, http://www.dhs.state.ia.us/cppc/service_reviews/qsr_overview.html.

119. *See* Gadlin, *supra* note 43, at 12, 17, 21 (discussing the problems associated with merging conflict resolution systems with managerial imperatives); LIPSKY, SEEBER & FINCHER, *supra* note 1, at 325.

120. *See* LIPSKY, SEEBER & FINCHER, *supra* note 1, at 168 (describing mediation as a distinct design component); Rowe, Integrated Systems, *supra* note 45, at 91-92 (describing mediation as a formalized process conducted privately between a mediator and two individuals frequently resulting in off the record settlements); Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model,* 12 OHIO ST. J. ON DISP. RESOL. 95, 130 (1996) (criticizing mediation's design for its inability to involve others affected by problems solved through private mediation).

121. LIPSKY, SEEBER & FINCHER, *supra* note 1, at 186; JEFFREY M. SENGER, FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT 138 (2004) (neutrals from private organizations used 80 percent of the time in pre-complaint dispute resolution).

B. *Root Cause Methodology: Enlisting Participants in Interrogating Underlying Causes and Their Possible Solutions*

The methodology of analysis and intervention is a second crucial element enabling the connection of individual cases to underlying structures and systems. It is key that the inquiry proceeds through identification of reasons supported by available data, and that this process produces an understanding of the relationship between the individual and the systemic in a way that enlists the affected parties in developing and acting on that knowledge.[122] Until they began reflecting on their systemic work, CCR did not have a name for their methodology. They came to see this work as a form of root cause analysis. Root cause analysis explores why a problem arose and persists by asking insistent questions that trace the problem to its source.[123] Most conflicts are indicators of underlying, partially hidden problems within the surrounding organization or setting. The initial framing of the problem tends to emphasize the most emotionally charged aspects of a dispute, and is often insufficient to accurately diagnose the problem and to figure out how to address it. Critical reframing deepens the questions asked of a particular participant and, when obvious explanations and remedies are insufficient, brings in new participants to engage in understanding and addressing the problem.

This methodology structures inquiry about the nature of a problem and its relationship to intervention strategies by continually prompting a series of questions about the appropriate scope and goal of an intervention: What kind of problem is this? Why is it considered a problem and by whom? How does it relate to other problems you have seen? What is causing this problem? What would it take to remedy it here and for others? What can be done about it now and in the future? The conflict resolver continually probes whether the questions as posed locate the problem at the level where it can be meaningfully addressed.[124] Question-making itself becomes an intervention; it is a process of making sense of a particular conflict and its potential for remediation.

This inquiry is a form of hypothesis generation and testing, performed by developing solutions, trying them out, and then stepping back to evaluate whether they work. This process operates like a mini-laboratory; it entails successive ap-

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122. *Cf* Paul S. Adler & Kim B. Clark, *Behind the Learning Curve: A Sketch of the Learning Process*, 37 MGT. SCI. 267, 270 (1991) (developing a learning process model that shows how data is processed within the organization to create new understanding of the design and production process); MacDuffie, *supra* note 17, at 492 (describing the philosophy that "when a person sees a problem, s/he is more likely to analyze it systematically, to communicate the problem more accurately to others in his/her team or work area, and to be motivated to find a preventive remedy."); *see also* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 299-300 (discussing Macduffie and root cause analysis).

123. MacDuffie desribes root cause analysis as:
> the careful, iterative examination of possible sources and remedies of the problem—a process known as the 'five whys.' The answer to the first "why" is often based on the easily observable or familiar antecedents to its occurrence. An attempted solution based on this relatively automatic diagnosis is unlikely to be successful for long, because there are other "root" causes that are only uncovered with more "whys."

Id. at 494. *See* Lee, *supra* note 99 (describing the process of asking repetitive "why" questions" to drill down into cause as a way of finding out what happened, why it happened, and what can be done to prevent it from happening again).

124. *See supra* notes 17, 61.

proximations of analysis, which are then tested and validated by experience. An intervention strategy emerges based on predictions derived from current understanding. The intermediary then analyzes the consequences of that intervention. Some aspects of the working hypothesis might be disconfirmed. This realization then prompts rethinking the hypothesis about what the problem is and how to address it.

The matrix analyses illustrate this methodology of hypothesis generation and questioning the questions. The spurned scientist, for example, initially described the negative employment decision as the result of a biased or arbitrary process. The conflict resolver posed a series of questions aimed at validating whether bias or unfairness was in fact operating, and continually peeled back the inquiry to see whether an undetected problem lay at the root of the negative employment decision.[125] Similarly, in the case involving the denial of vacation leave, the conflict resolver continually reframed the questions to reach the institutionally rooted source of managerial arbitrariness.[126] This kind of hypothesis testing draws on institutional, cultural, and professional knowledge about the dynamics of relationships, organizations, and systems. The analysis of the failed collaboration identified predictable flashpoints in a research relationship stemming from the structure of the relationship. The intervention of the collaboration agreement grew out of CCR's hypotheses about the dynamics of research collaborations, which are continually revised in light of what they learn from new cases.

This methodology builds systemic inquiry into the fabric of performing individual case work. CCR ombuds described a frame shift that occurred in their practice as they incorporated a systemic lens into their root cause inquiry, and this frame shift is noticeable in case reviews over time. The process of listening for systemic underpinnings begins when they first meet with clients. It affects the kinds of things they listen for and the kinds of questions they ask. They ask historical questions designed to trace back the problem to its source, to situate it in a broader context, to identify others who are affected by the problem, and to consider the interrelationship of that problem with other aspects of the organization. When did the problem first arise? Was there a time when it was different? Did anything change in the person or organization? What else was going on? What else is happening? Was anyone else affected by the problem or did anyone else experience the same thing?[127] They also ask more systems-related questions. Who benefits most by the conflict? Who is hurt most by the conflict, and what is its effect on other people? They then analyze whether a conflict serves some unacknowledged organizational purpose, separate from whatever personal needs it expresses, and why that purpose has been pursued in a problematic manner. They help relevant stakeholders assess whether that purpose is legitimate, and if so, whether it can be achieved through more productive means. They ask questions about the steps the person might take to change the dynamic, and the steps others would have to take. They ask about who else would need to be involved and what obstacles to change would need to be overcome.

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125. *See supra* section II.C.1.
126. *See supra* Section II.C.3.
127. The office has explored the complementarity between root cause analysis and systems approaches to family therapy, and their methodology has been influenced by both.

The intermediary gathers and validates information, both about the particular conflict and its larger context. Importantly, it does this independently, drawing on its knowledge base, as well as through interactions with those directly involved in the conflict and those with knowledge about or a stake in the underlying issues. Often, this involves integrating interdisciplinary understandings of the problem, as well as information about the problem's impact on people in different positions. Similarly, the process of developing solutions emerges through interaction with relevant stakeholders, who must be directly engaged in that process. It does not require that the participants themselves are self-reflective, although the process benefits tremendously when they are. Indeed, many conflicts explode because the protagonists lack the capacity to surface and address underlying issues. CCR's experiences show that participation in critical inquiry often prompts reframing, even when the participants would not reach those insights on their own. Sometimes, participation in the process develops participants' capacity to use root cause analysis in their routine work. Indeed, some interventions are explicitly designed to help groups achieve that ability.

As the examples discussed above illustrate, the effort to trace a problem to its source will often lead beyond the confines of a particular dispute. As a result, this methodology necessarily—although not always explicitly—combines normative and instrumental inquiry. Root cause analysis and critical reframing enable conflict intermediaries to figure out, as part of the process of problem solving, whether to treat a problem as discrete and limited to its participants, or as part of a broader pattern warranting more systemic intervention. By moving to a more systemic inquiry, the process necessarily identifies a wrong that warrants a more generalized intervention. This "something" could constitute a wrong because it violates shared understandings; it could be a wrong because the processes or routines in place violate those shared understandings; it could be a wrong because the shared understandings have never been made explicit, and when they are, they cannot withstand scrutiny.

Interdisciplinarity enables conflict intermediaries to conduct root cause and systemic analysis. People from different disciplines are predisposed to ask different kinds of questions reflecting different explanatory theories and intervention strategies. These differences in perspective can be achieved through the internal composition of an office or by involving those with relevant knowledge in the critical reframing process. For example, CCR was deliberately structured to draw on multiple disciplines, both in its analysis of problems and in its intervention strategies. It combines scientific, organizational development, legal, and psychological frames of inquiry.[128] The operation of these multiple perspectives has a destabilizing impact on the inquiry; it fuels the hypothesis generating and questioning process.

Root cause analysis encourages the parties to resolve conflicts by getting to their source, not just by finding a way to split the difference. It provides a check against the tendency of conflict resolution to focus on the presenting issues, the

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128. Howard brings a certain sensitivity to the scientific mission and a commitment to critical reframing. Kathleen offers a counseling framework, emphasizing the power of relational systems in shaping interaction. Doris comes to problems with a background in organizational systems and processes. Kevin brings advanced degrees in law and literature, thus combining literary, legal, and policy orientations.

urgent emotional needs, and the quick fix. This framework creates a pragmatic tension between analysis and intervention. One always asks the systemic question, but one does not necessarily act at the systemic level. Part of the process entails assessing the possibilities, risks, and costs of a systemic approach as part of a particular case or intervention. Sometimes it turns out there is no systemic problem, or at least not one that the organization and the larger society views as a problem.[129] Sometimes proceeding at the systemic level would compromise the capacity to address an individual case. Sometimes the protagonists do not want to address the underlying questions. Sometimes the stakeholders needed to make systemic changes cannot be brought to the table. Sometimes the issue is not well enough understood as systemic by the stakeholders to mobilize their commitment to addressing the problem. Sometimes the issue is not (yet) enough of a priority for the organization to take on the resource and time commitment necessary for systemic change, at least for the moment. Sometimes creative solutions can bypass dysfunctional systems. Root cause analysis enables reflective practice, which in turn equips conflict resolvers to craft interventions to match the demands and possibilities of the situations they face.

This root cause methodology forces a principled inquiry, both about the nature of the problem—why is it a problem and what is the justification for treating it as such—and about the level and scope of the solution. It also requires factual support for a diagnosis and proposed intervention. Intermediaries must justify their recommendations to those they are seeking to persuade. In an individual intervention this will involve those who are the direct protagonists. In a more systemic intervention it will involve all of those whose cooperation is needed to make the systemic intervention work and be perceived as legitimate. This legitimating process is crucial because the office's efficacy turns entirely on the persuasiveness of their analysis.[130]

In the CCR example, root cause analysis is incorporated into the practice of conflict resolution. In a smaller office, this critical analysis could be constructed by involving outside researchers in reflective practice inquiry or forming collaborative relationships with conflict resolvers in other offices. Some institutional intermediaries in other settings have followed a similar course. For example, in the social welfare context, innovative systems have created third party intermediaries who use root cause analysis and reflective practice to engage caseworkers, administrators, and families in generating solutions to systems failure manifested at the level of individual cases.[131] Other intermediaries have used similar methodologies for analyzing the patterns emerging from their individual conflict resolution work and for designing interventions that address systemic problems identified through this analysis. In the criminal justice context, aggregative approaches employed by innovative criminal courts rely on pattern identification, investigation of systemic causes, and involvement of responsible institutional actors in the

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129. For example, the relevant communities did not view the underlying cause identified in John's case—uncreative scientists don't necessarily advance—as a problem requiring any change.

130. The example of the case in the individual analysis/individual intervention illustrates the point. *See supra* Section II.D.

131. *See, e.g.,* Quality Service Review Overview: Improving Results for Children and Families, http://www.dhs.state.ia.us/cppc/service_reviews/qsr_overview.html.

development of remedies.[132] Systemic interventions driven by data and reflection about individual cases can be found in the descriptions of the methodology used by other institutional intermediaries in entirely different settings. In all these contexts, the mode of inquiry connects conflict resolution to learning, learning to reframing, and reframing to generating solutions that address underlying problems.

C. *Institutional Legitimacy within the Relevant Communities of Practice*

The capacity to connect conflict resolution to systemic change depends on the professional and organizational stature of the institutional intermediary. Participants in the conflict resolution process must be willing to work with the intermediary, which in turn requires that they have confidence in his or her integrity, knowledge, and judgment. They must believe that the intermediary has sufficient influence to bring to the table the various actors whose participation is necessary to address problems. This institutional legitimacy affords access to the institutional knowledge (such as about managerial dysfunctions or collaboration problems) and opportunities to use that knowledge to prompt institutional redesign (such as the use of collaboration agreements as the basis for creating a new institute). The office must have considerable stature and legitimacy across a wide range of organizational constituencies, operating at very different levels.[133] A person of sufficient knowledge, expertise, skill, and gravitas within the relevant community must occupy the role. The formal attributes of the position—title, level, salary, role, etc.—also play a role in defining its stature and influence. The stature and level also play a signaling function by communicating a view of the office's significance to the community within which it operates.

So, for example, CCR's access and influence depends upon the leadership's expertise and stature. Howard Gadlin is himself a trained scientist, with a track record as a faculty member and scientific researcher. He gave up a tenured faculty position as an experimental psychologist to take on the role of ombudsman. His scientific background enables him to communicate in the language of science, with those at different levels of the organization. He negotiated a position that places him at a very senior level within NIH and that also allows him to operate as an independent intermediary. This location provided a high level of visibility; both upper management and lower level employees see his office as a resource. He also plays a leadership role within the national conflict resolution arena.[134] Thus, this intervention range, which is crucial to the capacity for systemic understanding, depends upon the office's legitimacy at each of these levels.

Stature also affects the efficacy of institutional intermediaries operating in other domains. Judges who are repeat players in the criminal justice system bring a high level of stature and credibility to their role as systems change agents when

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132. *See* Garrett, *supra* note 115, at 40.

133. The ABA standards for ombudsman also emphasize the importance of stature: "An ombuds should be a person of recognized knowledge, judgment, objectivity, and integrity." ABA Standards, *supra* note 6.

134. For example, he has edited volumes of the Negotiation Journal, participated in drafting ABA resolutions on ombudsman, and is regularly invited to speak at national conferences.

operating within the scope of perceived authority and competence.[135] Similarly, panels of independent physicians and community advocates operating as third party intermediaries carry substantial weight and bring legitimacy to the process of conflict resolution and systems intervention.[136] In contrast, sometimes an ombuds or mediator lacks sufficient credibility within the community they must influence, either because they do not come to the position with the attributes that command respect or because the position has been marginalized within the community.[137] Under those circumstances, the office lacks the social and intellectual capital often necessary to play an effective intermediary role.

D. Participatory Accountability

Finally, the capacity to sustain this linkage of conflict resolution and systemic change over time requires mechanisms for providing participatory accountability. In this sense, accountability means having regular occasions for explaining and raising questions about practice and outcomes, and for evaluating, justifying, and revising one's practices in relation to the goals and principles behind the enterprise.[138] The intermediaries must regularly engage in questioning by and accounting to others whose judgments must be taken into account in the doing of the work. Accountability is important to check against abuses and bias, both in individual intermediaries and in the overall process. It also plays a crucial role in motivating the dynamic interaction between individual and systemic issues. CCR demonstrates how participatory accountability can be institutionalized by engaging peers in ongoing assessment and revision of their practice. This process provides for accountability in the traditional sense: assuring impartiality and preventing abuse of office, corruption, and pursuit of private ends.

Institutional intermediaries have considerable interaction over time with repeat players, and thus risk developing both positive and negative biases. Bias could operate to distort how intermediaries interpret information or which interests they emphasize. It could also create an imbalance in the quality of their interactions with people in different institutional positions. For example, there may be greater opportunity for repeat interaction with senior leadership of the organization than with lower-level employees. This greater contact and familiarity might skew the types of problems presented and the interests at stake. The opportunities for self-deception in professional practice are great, particularly where the intervener is providing services to people in vulnerable positions with limited choices

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135. *See, e.g.,* Garrett, *supra* note 115, at 63 (describing the role of judges, in addition to prosecutors and law enforcement officials, in restructuring the criminal justice system to "better detect, remedy, and prevent errors.").

136. *See* Hunter, *supra* note 117, at 134, 140-41; Louise G. Trubek, *Making Managed Competition a Social Arena: Strategies for Action,* 60 BROOK. L. REV. 275, 292 (1994).

137. *See* Meltzer, *supra* note 32, at 601-02; Lauren B. Edelman, Stephen Petterson, Elizabeth Chambliss & Howard S. Erlanger, *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma,* 13 LAW & POL'Y 73-97 (1991).

138. *See* Mark Bovens, Analysing and Assessing Public Accountability, A Conceptual Framework (EURGOV) No. C-06-01, *available at* http://www.cpmmex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf; Charles F. Sabel & William H. Simon, *Epilogue: Accountability without Sovereignty, in* NEW GOVERNANCE AND CONSTITUTIONALISM IN EUROPE AND THE US 395, 400-01 (Gráinne De Búrca & Joanne Scott eds., 2006).

and urgent needs. The possibility for confusing intentions and impact in this work is also enormous. Intermediaries must have a process to point out when bias may be operating, and to provide checks minimizing its influence on the process. Accountability is needed to operate as a check against personal prejudgments or single-minded, cognitive frameworks that exclude important aspects of a problem. It assures that interveners cannot hide decisions that violate practice norms, so that they can learn from, and take steps to rectify, their mistakes.

Accountability is also important as a basis for learning about problems that can be remedied, patterns that can help surface causes, and the potential for generalizing to other contexts.[139] By asking questions about choices and consequences of the work, accountability provides a basis for assessing performance in relation to process and outcome goals, which are themselves open to revision. Tracking outcomes provides the basis for assessing whether the goals of the office are being met, and produces crucial systemic information about recurring problems or patterns. It provides the internal tension needed to resist the tendencies to focus on the most emotional, urgent, obvious, or superficial issue, leaving underlying causes unchanged. Root cause analysis regularly involves conflict resolvers in a process of asking explicit questions about the types of questions they are asking and not asking. This form of accountability is built into the process of doing the work, both to assure that criteria for evaluation assess what is actually valued, and to link feedback to ongoing (and unpredictable) practice. It is also important that conflict intermediaries are accountable to the range of stakeholders who use the process, not just to the management or mediated through a single stakeholder.

Accountability is particularly necessary and tricky for a conflict resolution practice bound by confidentiality requirements. The experience with CCR shows the possibility of incorporating internal and external accountability into the doing of the work. Intermediaries who lack decision-making authority or coercive power must give compelling reasons to enlist participation and generate effective solutions; their work thus provides a kind of built-in accountability. Conflict intermediaries gain influence by providing reasons for their analysis and understanding of a situation, and by coming up with effective solutions. This role encourages intermediaries to monitor the adequacy of their investigation, analysis, and follow-through.[140] In this regard, ombuds' lack of formal power enhances their accountability.

An important source of this deliberative accountability comes from reflective practice work: regular, deliberative sessions conducted as part of strategizing about and critiquing the ongoing work of the office. CCR's weekly case reviews and staff huddles exemplify this practice.[141] Those sessions routinely analyze the choice points, strategies, and difficulties posed by the case at hand. "When we were developing the case review method, we worked hard to develop an atmosphere where people will surface mistakes. It is very common for people to say, 'I

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139. *See* CHRIS ARGYRIS & DONALD A. SCHON, ORGANIZATIONAL LEARNING: A THEORY OF ACTION PERSPECTIVE 22 (1978); Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development, in* HANDBOOK OF ECONOMIC SOCIOLOGY (Neil Smelser & Richard Swedberg ed., 1994).

140. Hunter, *supra* note 117, at 148.

141. *See supra* Section III.A.; Interview with Ombuds, in Bethesda, Md., (Feb. 28, 2002).

am having a hard time with this, I really messed this up.'"[142] These sessions often generate suggestions of a strategy or criticism of how something was handled, picking up on what might be perceived as a deviation from impartiality. The stance is one encouraging the ability to work with disparate ideas simultaneously and integrate them as a way of critically evaluating the adequacy of one's own position. This methodology generates a high tolerance for difference and for simultaneously accommodating different ways of understanding a problem.

CCR also uses reflective inquiry and critical reframing to learn about and revise their practice:

> As we are going through cases, we are trying to draw systemic lessons. The reflective practice, merged with sensibility about systemic cases, enables us to think about these cases. We make connections across cases in case reviews regularly; we refer to commonalities and differences within particular kinds of cases. It is more common than not, when someone is presenting a case, to have someone make a connection with a case that they presented or are working on. It happens all the time.[143]

Some form of external accountability is still important as a check against bias, groupthink, and corruption. External accountability can be integrated into this process by bringing in outsiders to do reflective practice work with the organization, and thus to provide them with regular feedback and frameworks for evaluation. In many respects, research operates as part of the office's reflective practice work, providing a form of external accountability by working over an extended time with a researcher who mirrors the kind of embedded independence and insider/outsider dynamic that CCR strives for in its practice. They have also worked intensively with a researcher using a reflective practice methodology inspired by Donald Schon's work to increase their understanding of conflict dynamics and effective interventions.[144] This model "enables them to talk easily about mistakes and successes in a safe way."[145]

Intermediaries' interactions with their overall constituency and the public create an additional, albeit weak, source of external accountability. The responsibility to report and make recommendations on systemic issues provides a baseline against which to assess progress. Willingness to use the office depends entirely on public perceptions of the office's efficacy and legitimacy. Tracking usage rates over time shows how different constituencies are voting with their feet and provides an indirect form of accountability. Also, it is possible for the office to track outcomes on systemic cases without violating confidentiality, thus providing a source of external accountability.

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142. Meeting with CCR, in Berthesda, Md. (July 19, 2006).
143. *Id.*
144. DONALD A. SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983).
145. *Id.* at 2.

Accountability could be enhanced by tracking information about individual cases over time.[146] CCR, like most conflict resolution offices, does not (and is not permitted to) maintain systematic data about the progress of individual cases, even for purely internal purposes such as self-evaluation and pattern identification. Concerns about the possibility of forced disclosure through subpoena prevent this information from being maintained. In fact, CCR destroys all notes on cases, retaining only demographic information reflecting general attributes of the conflict's participants and type of problem. Confidentiality around data retention and tracking is in fact a constraint on accountability. It prevents the office from systematically analyzing quantitative data, and thus limits the opportunity to look at problems with categories not thought of when the data was gathered. "We lose a lot of fine detail."[147] If conflict intermediaries had legal protections so that records could be kept without being subpoenaed, then confidentiality in the functional sense could be preserved and still allow the office to learn more from its cases and self-monitor.

There are additional ways to institutionalize accountability without abandoning independence. Accountability could be enhanced by periodic outside evaluations, based on metrics designed to assess performance in relation to both individual and systemic goals. This review could be performed by peers—researchers and practitioners with expertise in both the subject matter being addressed and in the area of conflict resolution. It would be worth exploring the role of relationships and methodologies that produce accountability by institutionalizing a process of inquiry about those practices.

V. REEXAMINING THE RELATIONSHIP BETWEEN CONFLICT RESOLUTION AND RULE-OF-LAW VALUES

This article began with an apparent dilemma. Informal conflict resolution is increasingly prevalent, and all indications are that there is no turning back.[148] Yet, these processes have prompted considerable criticism based on their purported compromise of widely accepted rule-of-law principles.[149] Criticism of non-adjudicative conflict resolution highlights the failure of these processes to advance the elaboration of general public norms through principled decision making. Critics also express concern about the departure from principles of impartiality and about the absence of accountability for both the decisions and outcomes of these informal processes. The gap between theories of legitimacy and practices of conflict resolution makes these new processes both unstable and more difficult to hold accountable.

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146. *See, e.g.,* Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination,* 84 N.C. L. REV. 927, 962 (2006); Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation,* 11 HARV. NEGOT. L. REV. 253, 256 (2006).

147. Meeting with CCR, supra note 142.

148. LIPSKY, SEEBER & FINCHER, *supra* note 1, at 319.

149. *See* Abraham, *supra* note 5, at 366-68; Daniels & Sabin, *supra* note 117, at 222-23; Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller,* 92 HARV. L. REV. 410, 414 (1978); Luban, *supra* note 4, at 2622-26; Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory,* 61 B.U. L. REV. 885, 886-87 (1981); Susan Sturm, *A Normative Theory of Public Law Remedies,* 79 GEO. L.J. 1357, 1410-11 (1991).

The matrix analysis developed here invites a reconsideration of the assumptions underlying this debate. This section demonstrates that rule-of-law principles can be realized using non-adjudicative processes that integrate individual and systemic issues, at least under certain conditions.[150] Informal conflict resolution processes can internalize those values without imitating adjudication, and doing so will enhance the legitimacy and efficacy of these processes. The CCR case study is a springboard for developing a more dynamic understanding of these rule-of-law values—one that accounts for how they actually operate in different settings. This approach provides a framework for assessing both informal and formal conflict resolution in relation to their realization of rule-of-law values. It also challenges the idea that the methods used in adjudication are the only, and necessarily the best, way to realize those values across the board. Finally, this analysis shows the importance of explicitly constructing the relationship between formal and informal systems of conflict resolution as a way of enhancing the legitimacy and efficacy of each.

A. Elaborating Public Values

One of the core assumptions underlying the critique of ADR is its inability to advance public values through principled decision making. This conclusion takes for granted a legalistic meaning and method for elaborating public values. It presumes a particular idea of public decision making—the formal declaration of general rules by courts or legislatures—and a particular conception of how public values emerge from conflict resolution—through Socratic reasoning from binding precedent.[151] These are important forms of public norm elaboration, but they are not the only principled way that public values can be articulated and generalized, particularly in contexts where the coercive power of the state is not directly implicated. As many theorists have shown,[152] generalized norms are also developed outside the formal organs of the state. They may apply beyond the scope of an immediate conflict, serve broad social purposes, meet shared expectations of legitimacy, solve collective problems, and act authoritatively within a particular domain. In these respects, these informal norms are "public."

Over time, informal public norms often influence formal policy and law, particularly as they gain currency through reiteration, coordination, and revalidation.[153] The processes of conflict resolution described above institutionalize a mechanism for this kind of normative development. Linkage of individual conflict resolution and systemic change creates the capacity for informal conflict resolution to generate public values through principled decision making. It can

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150. *See* Luban, *supra*, note 4, at 2647 (an argument calling for such a jurisprudence of informal conflict resolution); Daniels & Sabin, *supra* note 117, at 222-23.

151. *See* Michael C. Dorf, *The Supreme Court 1997 Term--Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 33-40; Fiss, *supra* note 3, 1085; William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 240 (1978), *cited in* Luban, *supra* note 4, at 2622.

152. *See infra* notes 165-168.

153. Reva B. Siegel eloquently analyzes a similar process of constitutional meaning-making in the context of the ERA. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1340-41 (2006).

produce active engagement in public norm elaboration and transformation in non-adjudicative settings.

This conception of public norms builds on a rich foundation of scholarship challenging the adequacy of formalistic conceptions of law and articulating more constitutive, nuanced, and descriptively accurate depictions of public normative elaboration. Conflict resolution and deliberative democracy scholarship has begun to explore informal processes that are intentionally designed to generate and generalize public norms.[154] Reva B. Siegel's important article on constitutional culture provides a language for understanding the dynamic relationship among conflict, citizen engagement, and norm elaboration:

> Collective deliberation helps establish what things mean and why they matter. Collective deliberation is thus useful, not only as a procedure for deciding how to act, but also as a practice for articulating who we are. Collective deliberation forges the meanings through which individuals and communities can express identity, and infuses practical questions with symbolic significance so that they provide occasions for individuals and communities to vindicate values through which they define themselves.[155]

Socio-legal scholars have also documented the law's constitutive character, depicting law as a "reciprocal process in which actions and interpretations given by individuals to their world—and law and legal institutions as part of the lived world—become repeated, patterned, stabilized and these stabilized patterns become part of the meaning system deployed by as well as constraining the individual."[156] Recently, economic literature has used norms to explain a breadth of positive and normative issues, including the informal resolution of property disputes among rancher neighbors in Shasta County, the preference of the diamond industry for non-legal means of contract enforcement, and the stability of racial discrimination in competitive markets.[157]

The combination of root cause analysis and multi-level remediation, illustrated in the CCR example, provides an example of deliberately designed processes of public norm elaboration outside of adjudication. This methodology pushes stakeholders to make implicit norms explicit, and then involves them in an inquiry by which those norms are justified or rejected. This norm elaboration happens as part of determining whether an issue is problematic, and if so, why and what can be done to change it. The process of finding causes and assessing impacts also poses the question of how others are potentially affected by a problem,

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154. *See, e.g.*, Paul R. Kimmel, *Culture and Conflict, in* THE HANDBOOK OF CONFLICT RESOLUTION 453, 456 (Peter T. Coleman ed., 2000); Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 572-73 (2006); Susan Opotow, *Aggression and Violence, in* THE HANDBOOK OF CONFLICT RESOLUTION, *supra* note 154, at 403, 415.

155. Siegel, supra note 151, at 1341 (internal citations omitted).

156. Patricia Ewick & Susan S. Silbey, *The Structure of Legality: The Cultural Contradictions of Social Institutions, in* LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK 149, 151 (Robert A. Kagan et al. eds., 2002).

157. *See, e.g.*, Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 132 (1992); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

and whether the opportunity to craft a more general solution exists and should be pursued. Problems revealed through conflict resolution sometimes give rise to changes in policy, which apply to everyone similarly situated within the relevant domain. The advancement of public norms also occurs through addressing institutional dysfunctions that prevent their realization. For example, the case involving the lab chief identified systemic problems in sharing information, power, and resources, which interfered with the quality of collaboration and produced unfairness. The process produced a general framework to guide the labs' interactions and reduce arbitrariness and misunderstanding.[158]

Public norms develop by using reports, deliberation, training, and group facilitation to figure out how to incorporate desired values into practice. This line of inquiry leads to second order norms, which set up processes and principles to address new problems.[159] Collaboration agreements, used to construct fair and workable research collaborations and to create a framework for addressing disagreements, are perhaps the most vivid illustration of a "constitutional" form of public norm elaboration.[160] They generate a set of norms from practice; they also institutionalize ways to prevent or address future problems. Through the device of collaboration agreements, utilized at different levels of organizational practice, CCR helps NIH make explicit a set of implicit or underspecified norms and articulate norms where none have existed. This methodology enables the development of public understandings and remedies that attach in a meaningful way to the day-to-day dilemmas that people face in a collaborative research environment. In the absence of a structure or a process, there is no way to articulate those understandings or to hold people accountable for acting on them. By institutionalizing the practice of using collaboration agreements, CCR is enabling the development of principled norms and accountability for addressing wrongs that may not violate pre-specified rules or that can only be understood as problems in context. Here, law operates as a set of practices. Collaboration agreements create occasions for elaborating values, identifying problems in advance, developing shared solutions, and holding people accountable.

As the problems become better understood as recurring and preventable through institutional design, some interventions generate deliberations that produce an overarching governance structure built around principles, values, and lessons gleaned from conflict resolution experience with recurring problems. Sometimes they produce "constitutional moments" for the organization, when the collective participates in rethinking the framing principles and structures governing their work. In this manner, public values emerge from a non-adjudicative process.

The articulation of these public values draws on varied sources. Formal law plays a role in several respects. It establishes the boundaries of acceptable decision making and practice. Relationships may not violate, for example, the rule about sharing biomedical research. Employers must reasonably accommodate employees' disabilities. Legal principles cement the legitimacy of an abstract value, which must then be translated into practice. Under some circumstances,

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158. *See supra* Part II.C.4.
159. *See* Adler & Clark, *supra* note 122, at 270; *cf.* H.L.A. HART, THE CONCEPT OF LAW 94 (1961).
160. *See supra* Part II.C.4 (a more detailed description of the role of collaboration agreements).

formal law also influences how people interpret the meaning of particular values. This is particularly apparent in the area of race discrimination; ideas of race are heavily influenced by legal concepts of intentional discrimination.

In many conflicts, formal legal principles do not adequately diagnose the problem or guide the process of determining whether there is an issue warranting more general attention. Normative choices and meaning emerge from the active deliberation of participants in the problem-solving process; the participants must explain their perspective so that it can be understood by, and be persuasive to, others. In doing so, these participants draw upon professional norms, community norms, and widely shared ethical norms such as fairness.[161] Conflict intermediaries draw on analysis of past practice, tested by what works, in developing their understanding of a related issue and in reframing participants' understandings of particular conflicts. Analysis of patterns revealing dysfunctions also triggers inquiry about why a pattern posed a problem, whether the problem warrants more general attention, and how to address it.

Thus, when linked to systemic change, non-adjudicative conflict resolution can foster the articulation of implicit norms, "reasoned elaboration and visible expression of public values,"[162] public solutions to common problems, implementation of public norms, and engagement with the relationship between norms and remedies.[163] Law thus operates as a catalyst by facilitating the elaboration and implementation of public values, and the productive engagement of normative inquiry among relevant institutional actors. Rule-of-law values impose an obligation to articulate the basis for determining that a condition is sufficiently problematic to warrant public attentiveness, and to justify the adequacy and appropriateness of public actions.[164] Conflict resolution thus institutionalizes principled decision making that can be generalized within the community of practice in which it operates.

The objection might be posed, what is the legitimate basis for generalizing a norm developed through individual conflict resolution? Generalization has been thought to require the formal protections of adjudication.[165] This position assumes that norms can only be generalized by imposing them on others, either through another case or through a general rule. We have seen, however, that generalization can take place through "substantive process" rather than through the imposition of rules. For example, generalization can proceed through reframing problems and thus expanding the scope and level of participation, convening a process to consider the implications of norms on larger systems, and participatory systems redesign. Different kinds of processes are needed to justify these forms of generalization than for norms generalized through rules. More generally, the justifica-

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161. An illustration of the role of norms can be found in the description of the process used in the intervention involving the decision not to select John for a new position. *See supra* Part II.C.1. There, the questions driving the inquiry were informed by legal norms (whether the process was biased), community norms (whether scientific standards of merit were justified), ethical norms (whether the process was fair), and organizational norms (whether the process was reflective of deeper organizational dysfunction or collective dissatisfaction).

162. Luban, *supra* note 4, at 2626.

163. Robert Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983).

164. Susan P. Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 67-69 (2004).

165. *See, e.g.,* Fuller, *supra* note 20, at 328; Fiss, *supra* note 3, at 1075.

tion for generalizing a norm depends upon the legitimacy of the process used to develop that norm, as well as the scope and consequences of its application.[166] Norm elaboration falls on a continuum of generality: from unarticulated to articulated, to justified (or rejected), to shared with others, to institutionalized within a particular setting, to adopted in multiple settings, to embodied in a rule or practice, to generalized to other institutions within the community of practice, to adopted across domains, to embedded in published, enacted law. The question of when it is legitimate to apply a norm articulated in a particular conflict to other contexts and stakeholders depends upon where the process falls on this continuum.

Here again, rule-of-law values can be built into the process used to decide when and to whom norms may be generalized. If people are similarly situated with respect to a particular problem, fairness permits—indeed, often requires—more general application. Root cause analysis builds in the requirement that generalization be justified, based on the identification of commonalities in experience, cause, and solution. It also incorporates the participation of those affected by, responsible for, and knowledgeable about, the problems at issue. Remedies cannot be imposed through this process; they must emerge from this collective deliberation, propelled by the search for causes and solutions.[167]

Of course, sometimes norms and remedies cannot be developed through this collaborative process. Several examples of this can be found in the matrix discussion. For example, in the case of the spurned scientist, John did not accept the fairness and legitimacy of the decision not to award him the position he felt he deserved. Sometimes crucial stakeholders are unable or unwilling to participate, or the conditions for crucial organizational redesign may not yet exist. Sometimes participants want to solve the immediate problem and move on. Quadrant III of the matrix demonstrates that some conflicts are not amenable to reframing as systemic issues. Some, for example, might involve serious wrongdoing warranting the use of coercion. Coercion may be necessary to provide an end point for an ongoing conflict, to induce unwilling actors to take responsibility for addressing serious problems, to provide retrospective remedies for harms caused, or to take adverse action against an individual. In these situations, advancement of public values cannot legitimately be achieved through institutional intermediation.[168]

These limits focus attention on the interdependence of informal and formal conflict resolution systems. Some problems are simple and recurring; experience with deliberative processes over time may show that a rule would, in fact, most effectively address that problem. The processes used to impose rules could then be invoked. Rules could emerge internally, through policy formulation, or externally, through state intervention. Institutional intermediation operates in tandem with other forms of conflict resolution.

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166. *See* Joanne Scott & Susan Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. (forthcoming Summer 2007) (manuscript at 7, on file with author).
167. *See* Dorf & Sabel, supra note 122, at 286; Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1428 (1991).
168. In CCR's work, for example, disputant preferences determine how a given matter is handled. At any point a dissatisfied person can pursue any of the formal grievance and complaint processes available within the organization. And every visitor to the office is always informed about the full range of formal and informal processes available for that person's particular issue.

This analysis suggests that formal and informal systems are mutually consti-
tutive, with capacities to generate public values for conflicts of different types.[169]
They can generate norms with different types of legitimacy. Norms generated in
one domain affect those developed in the other. They can compete with each
other, co-exist, or enhance each others' efficacy and legitimacy.[170] The type of
relationship among these systems can, and should, be deliberately and self-
consciously constructed. Thus, collaborative critical inquiry can generate public
values through internal processes of participation and accountability. Norms de-
veloped through processes attentive to rule-of-law values may carry greater
weight in other conflict resolution arenas. These processes cannot, however, gen-
erate norms binding beyond the scope of that community, at least not without
further process. Yet, the system's legitimacy is undermined if there is no effective
backstop to address problems that cannot be resolved cooperatively, when those
problems violate established norms and have consequences that fall heavily on
particular individuals.[171]

At the same time, the co-existence of these conflict resolution systems poses
potential threats to the efficacy of each. Sometimes, the capacity to cut deals in
private, without regard to fairness or public consequences, undermines formal
law's capacity to advance rule-of-law values.[172] Conversely, formal legal rules
and sanctions can undercut the capacity of intermediation to involve necessary
participants, generate much-needed data, or produce genuine deliberations.[173]
They can also unduly narrow the normative framework within which root cause
analysis must proceed. The contrast between anti-discrimination and disability
norms illustrates this point.[174] One of the examples provided for quadrant III of
the matrix illustrates how antidiscrimination law and process can distort the frame
for analyzing cases in which race may play a role. The law imposes a fixed and
unitary meaning of race discrimination; at the individual level it is defined by
deliberate, unequal treatment based on race. This legal framework dictates how
race is understood; it discourages participants from addressing the racial dynamics
producing exclusion, even when those legal standards do not apply. Contrast this
rigid, rule-based approach with the law's approach to disability.[175] There, the

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169. *Cf.* David Trubek & Louise Trubek, *New Governance and Legal Regulation: Complementarity,
Rivalry, or Transformation* 2-3 (Univ. of Wis. Law Sch., Legal Studies Research Paper Series, Paper
No. 1022, 2006).

170. *See* JEAN L. COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM 164-79 (2002); Men-
kel-Meadow, *Whose Dispute, supra* note 2, at 2676; Trubek & Trubek, *supra* note 169, at 3-5.

171. For example, research shows that proactive efforts to create effective systems for preventing
sexual harassment are unlikely to work if clear violators of sexual harassment norms do not receive
discipline. Sturm, *Second Generation, supra* note 13, at 471-72 (citing Charles L. Hulin et al., *Organ-
izational Influences on Sexual Harassment, in* SEXUAL HARASSMENT IN THE WORKPLACE:
PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES 127, 131-34 (Margaret S. Stockdale ed.,
1996)). CCR has an abiding interest in the NIH providing strong and effective grievance and com-
plaint mechanisms.

172. *See* Abraham, *supra* note 5, at 366; Luban, *supra* note 4, at 2626.

173. *See, e.g.,* Simon, *Toyota Jurisprudence,* supra note 57, at 43; Sturm, *Second Generation, supra*
note 13, at 475; Trubek, supra note 136, at 294-96.

174. We are grateful to Liz Emens for inspiring this comparison of disability and anti-discrimination
norms.

175. Congress enacted the Americans with Disabilities Act in 1990 to "provide a clear and compre-
hensive national mandate for the elimination of discrimination against individuals with disabilities."
Pub. L. No. 101-336, 104 Stat. 337 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (2000)).

legal standard of reasonable accommodation invites—indeed, requires—the participants to deliberate about the meaning of disability in context and to try to address the consequences in the design of the workplace, at least with respect to that individual.[176] This kind of legal standard combines the imperative of formal law with the dynamism of collaborative problem solving.

The discrimination/disability example illustrates a more general point. Conflict resolution norms and processes in one arena can be designed to take account of their impact on public values developed in other conflict resolution systems.[177] This realization underscores the potential and desirability of actively negotiating the relationship among these informal and formal normative systems. Legal norms could be articulated so that they foster conflict resolution designed to advance public values in other domains. Informal conflict resolution could be designed to enhance their capacity to advance public values by building in the features linking individual conflict resolution with systemic issues.[178]

B. Rethinking Impartiality

Impartiality is another important rule-of-law value that has figured prominently in the conflict resolution debate. The value of impartiality operates as a means of assuring unbiased and principled decision making. It is intended to provide process integrity, which requires that the process is not stacked in favor of (or against) any participant. This means that the third party is equally open to the concerns and arguments of all sides, and will not conduct the process from a predetermined point of view.

The conventional view achieves impartiality through detached neutrality.[179] This means that, ideally, the third party should have no direct knowledge of the conflict or prior relationships with the participants. This conception of impartiality underlies a strand of criticism directed particularly at embedded conflict resolution.[180] The assumption is that impartiality can best be achieved by removing the conflict from the context within which it occurs, and limiting the potential for outside relationships or knowledge to taint the process. This view would preclude embedded intermediaries, and thus challenges the legitimacy of a crucial feature enabling conflict resolution to generate public values.[181] Detached neutrality would practically disable conflict resolvers from using systemic knowledge in their individual case work or from playing the multiple roles that enable systemic

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The ADA requires employers to provide qualified, disabled employees with reasonable accommodations unless "a covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity." *Id.* § 12111(8), (9).

176. *See* Elizabeth Emens, Integrating Accommodations 5 (Nov. 27, 2006) (unpublished manuscript) (on file with author).

177. *See* COHEN, *supra* note 168, at 164-79. *See* Susan Sturm, *Law's Role in Addressing Complex Discrimination, in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 35, 54-56 (Laura Beth Nielson & Robert L. Nelson eds., 2005) (a discussion of courts' role in facilitating norm elaboration in informal communities of practice).

178. *See supra* Section IV.

179. *See* Owen Fiss, *The Forms of Justice,* 93 HARV. L. REV 1, 14 (1979); Lon Fuller, *The Adversary System, in* TALKS ON AMERICAN LAW 34 (Harold J. Berman ed., 2d ed. 1971); *see also* Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374, 374 (1982).

180. *See, e.g.,* Edelman, *supra* note 3.

181. *See supra* notes 109-21 and accompanying text.

responses to problems surfaced by individual cases. It would preclude the conditions necessary for the linkage of individual and systemic intervention.

An unbiased conflict resolver is a value crucial to process integrity. However, detached neutrality is not the only, or even necessarily the best, means of achieving that end. Even in adjudication, bias cannot be eliminated without taking account of its more structural forms. It is now well understood that "the haves come out ahead" in the litigation process,[182] and that every decision maker approaches a problem from a perspective that builds on unstated assumptions and baselines often favoring more powerful group members.[183] Detached neutrality does not provide a way of detecting or protecting against these forms of bias.

Detached neutrality has even less salience in non-adjudicative conflict resolution. There, the third party does not impose outcomes, but instead frames the way the conflict will be addressed, including who is at the table and how they participate. Impartiality requires that third parties do not privilege any party or point of view in that process. They must assure that the process is fair and open, and that every relevant stakeholder can participate meaningfully and fully. Unbiased process requires that every participant has the capacity to influence how issues are framed and solutions are developed. To achieve this goal, a third party requires sufficient knowledge and access to identify relevant people who have been excluded or undervalued in the framing of the issues, and to provide a means for their effective participation. This demands ongoing interaction and knowledge of the context in which the conflict is occurring. These interactions introduce relationships that could bias third parties in the performance of their role. Thus, the engagement required to reduce structural bias in the process produces risks of interpersonal bias in the third party.

The CCR example shows the promise of a structural solution to this apparent dilemma. Bias is reduced through institutional design: first, by assuring the independence of the decision maker from the control of any particular interest; second, by creating ongoing critical inquiry from the perspective of multiple participants and points of view; and third, by building in forms of accountability to those multiple participants, rather than to any one position. Bias is checked by institutionalizing "multi-partiality." Bias is acknowledged as inevitable and as something that must be surfaced and corrected.[184] Reflective practice, introducing an interdisciplinary perspective, provides one such check. This process builds in destabilization of a fixed or predetermined point of view. The reflective inquiry calls upon participants to explain their understanding and strategy for each case. They are routinely questioned about their strategies and roles. The concern for bias is an explicit part of this inquiry. This approach resembles the de-biasing idea, developed by Jolls and Sunstein as an intervention for companies.[185] It acknowledges

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182. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW. & SOC'Y. REV. 95, 97-98 (1974).

183. Martha Minow, *The Supreme Court 1986 Term--Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 11-14 (1987); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877, 1881-83 (1988).

184. *Cf.* Sturm, *Architecture of Inclusion, supra* note 96, at 257, 288-91 (describing the importance of developing institutional mindfulness as a way of reducing bias).

185. Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 Cal. L. Rev. 969, 976 (2006).

that conflict resolvers are affected by the process they facilitate, and thus it is important to build checks against the expression of bias into that process.

Root cause analysis provides another method for assuring full and meaningful participation in the conflict resolution process. This method interrogates problems by involving those directly affected in identifying the points of breakdown and possible remediation. Its logic requires substantive participation in analysis and intervention by those with knowledge of the problem. This methodology induces intermediaries to pay careful attention to how they frame their intervention, and to question assumptions in relation to the views of others and the consequences of acting on them.

Finally, the intermediary role may be defined to build in accountability to multiple constituencies. Voluntary party participation performs this function. The intermediary's legitimacy and efficacy depends upon the willingness of all affected parties to participate in the root cause inquiry, which in turn provides a strong incentive to adopt a stance of independence and institutionalize a practice of legitimacy.

By institutionalizing multi-partiality, this approach enables the type of interaction that is crucial in linking individual and systemic interventions, while protecting against the expression of bias. This concept has applicability in both the judicial and non-judicial arena. It could help design ways to hold judges accountable for their non-adjudicative roles within litigation, such as overseeing discovery, promoting settlement, and designing remedies. It also provides a framework for evaluating the legitimacy of embedded conflict resolution systems. This analysis is another example of how the meaning of rule-of-law values can best be constructed in particular contexts. It also shows that understandings developed within informal conflict resolution can be instructive for the design of formal process.

VI. ADDRESSING THE TENSIONS BETWEEN INDIVIDUAL AND SYSTEMIC WORK

It is important to acknowledge and address the constraints and tensions that accompany the linkage of individual and systemic work. On the surface, confidentiality seems like an enormous limitation on systemic work. Many conflict resolution professionals make an ethical commitment to maintain confidentiality, which means that a case cannot be discussed in ways that would reveal the identity of the clients without their permission.[186] The intermediary may only use information that is not identifiable to an individual, unless the parties agree. The intermediary may not initiate a systemic intervention if doing so would run the risk of revealing the person bringing up the issue. Intermediaries must get permission from the person raising the issue before involving any additional parties in addressing the conflict. Autonomy constraints also limit when intermediaries can proceed with systemic issues. Many people prefer to handle things on their own; they just want a little coaching. They are seeking perspective and suggestions from someone who is not involved directly in the dispute but knows enough to be helpful.

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186. *See* ABA Standards, *supra* note 6, at 4.

Confidentiality does not in fact operate as an insurmountable constraint on systemic work. First, there are ways to maintain confidentiality and still address patterns or problems at a more systemic level. Part of the intervention can include taking steps to minimize the risk of adverse action stemming from raising the issue. Many of the people who come to the office do so because they are offered confidentiality. They are concerned about the consequences of disclosure—that someone whose opinion matters will know they have raised an issue, and that raising the issue would trigger negative responses. Managing the consequences of disclosure changes the calculus of confidentiality. For example, an individual came to CCR with a problem that no other person in the lab was in a position to raise. Together with the concerned individual, CCR devised a way of raising the issue in a form that would not lead to her identification. More importantly, when individuals see the possibility of constructive intervention designed to address their concerns, most individuals are comfortable having their issue raised with at least some people.

Second, confidentiality brings with it some advantages for connecting individual and systemic work. The promise of confidentiality reduces the risks associated with surfacing a problem within the workplace. It also provides a space for brainstorming and taking risks, at a point when it is easy to backtrack, revise, and correct misunderstandings. It enables people to take responsibility for acting. It allows all of the parties to speak openly and honestly about a situation than they might in a formal proceeding, where there could be unanticipated consequences of acknowledging mistakes, errors, or vulnerabilities. People often resist admitting errors when they could be exposed publicly before they can take remedial steps. They may wind up defending a whole system they want to change to keep from revealing those mistakes. Also, some kinds of information needed to bring about change will only be revealed if there is some control over who will have access to that information. This includes information about the dynamics that are sustaining a systemically problematic situation, which are often partly interpersonal or political. To address problems, it is sometimes important to understand the history and politics explaining why a structure is in place—for example, to serve personal ends. Confidentiality also enables systemic work to take place within subunits of an organization that may be unwilling to tackle problems if doing so invites scrutiny or criticism from those above them. Cumulative change at the subunit level may produce fertile ground for system-wide change.

Third, data can be aggregated and shared without revealing the identity of individuals. There are general points that can be drawn from the particulars, without making explicit reference to them. The intermediary can compose a hypothetical case that is a composite of cases, which captures the essential pieces and dynamic of the conflict. Information drawing on the lessons of the confidential cases can be presented without breaching confidentiality. Also, reflective practice—ongoing discussion among a group of people bound by confidentiality— serves as a way to pool information without disclosing that information publicly. Confidentiality around data retention and tracking is, however, a constraint. It currently prevents the office from performing a systematic analysis of data, and from detecting problems that fall outside predetermined or entrenched analytical categories.

It is also important to acknowledge conflict resolutions' limitations as a trigger for systemic change. Conflict resolvers are constrained by their obligation to

address a problem's individual dimensions. The parties' control over the scope and focus of the intervention remains paramount. In the short run, this means that individual dimensions must take priority and may trump the decision to address longer term, systemic issues. In addition, there is a tendency to conceptualize cases at the individual level. The emotional valence of a case is gripping and insistent, making it difficult to avoid concentrating on the compelling character of the human drama in a particular instance.

In addition, the type of information obtained through conflict resolution is skewed. Conflict resolvers only see the problems that people are unable to resolve without outside intervention and are willing to raise. Problems that people do not see, or are not raised, will not emerge through conflict resolution. Nor does individual conflict resolution prompt the gathering of systematic information across settings, unless the problem and the intervention have been reframed at a systemic level. Systemic interventions, such as task forces or deliberative bodies gathering and evaluating data about particular aspects of practice, could, however, emerge from or proceed in conjunction with conflict resolution.

A corollary of the repeat player phenomenon also raises potential problems. A good working relationship with repeat players complicates the conflict resolution process when there is a complaint about one of them. There are, however, ways of minimizing this problem. For example, CCR staff members do not socialize with anyone in a position to come to the office with a problem. A group practice provides another way out of individual conflict situations. There are instances in which a particular ombudsman will ask someone else to take a case if it poses risks of bias or conflicts of interest. Reflective practice also provides a check on the expression of bias over time.

VII. CONCLUSION

This article shows that the prevailing assumptions that frame the ADR debate are neither universally true nor endemic to informal conflict resolution. Contrary to the assumptions underlying the scholarly and practitioner debate, individual conflict resolution can produce systemic change, and in the process, generate institutional practices advancing public values and addressing issues of common concern. This article documents an internal conflict resolution process that both resolves individual, private disputes *and* generates systemic solutions and public norms. It can do this in a manner that is principled, generalizable, and accountable. Building these values into informal conflict resolution also improves those processes' efficacy and legitimacy. Embedded conflict resolution, when structured to produce critical inquiry, accountability, and independence, enhances the capacity to produce effective individual outcomes as part of a long term process of generating systemic improvements and norms.

The process of writing this article together has transformed the way each of the authors thinks about conflict resolution and its relationship to law. It has provided Howard with critical frameworks enabling his office to evaluate and improve their practice. It has infused Susan's theoretical stance with methods and examples that both validate and destabilize that framework. The resulting analysis hopefully provides useful tools to those engaged in conflict resolution, either as third parties or as participants. Also, this article attempts to move the conflict resolution debate beyond the stalemate between advocates and critics of ADR.

The choice is not either/or, or once-and-for-all, but when, under what circumstances, and how best to mediate the relationship between individual and systemic conflict resolution. This approach provides conceptual frameworks for evaluating the legitimacy of informal processes, and for designing accountability mechanisms that can work within the relevant context.

This analysis offers a way to broaden and deepen the discussion of law's relationship to the promotion of public values. Law is not limited to formal norm elaboration through articulating general rules enforceable by state coercion. It is also about creating systems that foster the capacity of actors in different settings to identify, generate, and revise norms, and to structure systems that are more likely to produce desired conditions and practices. It involves engaging with the practices that encourage or undermine values we care about. Public values are thus embedded in an institutional understanding and analysis. Only through realizing norms in institutional practice can we give concrete meaning to Robert Cover's profound articulation of the role of law: "To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the 'is' and the 'ought,' but the 'is,' the 'ought,' and the 'what might be.'"[187]

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187. Cover, *supra* note 163, at 10.